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1332

United States 1332

Circuit Court of Appeals

For the Ninth Circuit.

PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.


Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

FILED

JAN 4 - 1923

F. D. MONCKTON,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

T. J. GEISLER, Henry Building, Portland, Oregon,

For the Appellant.

ROBERTS & SKEEL, Alaska Building, Seattle, Washington, and BARNETT H. GOLDSTEIN, Wilcox Building, Portland, Oregon,

For the Appellee.

In the District Court of the United States for the
District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE
RUBENSTEIN, PAUL HARBAUGH,
BEN LEVIN, JANE DOE SULLIVAN,
GENERAL NOVELTY CO., JOHN DOE,
RICHARD ROE and ROBERT ROE,
Defendants.

Citation on Appeal (Original).

United States of America,
District of Oregon,—ss.

To Joseph F. Dwyer, Plaintiff, GREETING:

WHEREAS, Paul Harbaugh, one of the above-named defendants, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Dis-

trict Court of the United States for the District of Oregon, in your favor, and has given the security required by law.

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Portland, in said District, this 12th day of August, 1922.

CHAS. E. WOLVERTON,

Judge.

Due and timely service of the above Citation is hereby admitted.

E. L. SKEEL,

ROBERTS & SKEEL,

Alaska Bldg., Seattle, Wash.,

B. H. GOLDSTEIN,

Of Attorneys for Plaintiff.

Dated: Seattle, Washington, Aug. 14, 1922. [1*]

[Endorsed]: No. 8369. 25-288. In the District Court of the United States for the District of Oregon. Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, General Novelty Co., John Doe, Richard Roe and Robert

*Page-number appearing at foot of page of original Certified Transcript of Record.

Roe, Defendants. Citation on Appeal. U. S. District Court, District of Oregon. Filed Aug. 24th, 1922. G. H. Marsh, Clerk.

In the District Court of the United States for the
District of Oregon.

March Term, 1919.

BE IT REMEMBERED that on the 22d day of March, 1919, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint, in words and figures as follows, to wit: [2]

In the District Court of the United States for the
District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE
RUBENSTEIN, PAUL HARBAUGH,
BEN LEVIN, JANE DOE SULLIVAN,
GENERAL NOVELTY CO., JOHN DOE,
and RICHARD ROE,

Defendants.

Bill of Complaint.

To the Honorable Judges of the District Court of
the United States, in and for the District of
Oregon, Ninth District:

The complainant alleges:

I.

That this suit is brought under the Patent Laws of the United States for infringement of United States letters patent number 1,268,222, issued June 4, 1918, and that the amount in controversy, exclusive of interest and cost, exceeds the sum or value of Three Thousand (\$3,000.00) Dollars.

II.

That plaintiff Joseph F. Dwyer is a resident of Seattle, King County, Washington; that defendants I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, John Doe, Richard Roe and Robert Roe, are residents of Portland, Multnomah County, Oregon; that General Novelty Co., complainant is informed and believes, is a copartnership, composed of the other defendants herein named.

III.

That Joseph F. Dwyer, being within the meaning of the statutes of the United States, the first, sole, true and original inventor of new and useful improvements in Ticket Dispensing Machines not known or used [3] before his invention or discovery thereof, did, prior to June 4, 1918, duly make and file an application in writing with the Commissioner of Patents of the United States for

letters patent upon said invention and improvements, and that subsequently, on June 4, 1918, letters patent of the United States number 1,268,222, were duly issued in pursuance to said application for said invention or improvements, whereby there was secured to said Joseph F. Dwyer, his heirs and assigns, for the full term of seventeen years, the full and exclusive right, to make, use and sell the said invention and improvement.

IV.

That the invention of said letters patent is of great value and importance, that plaintiff has caused great quantities of said Ticket Dispensers to be manufactured and put in use and has caused the date of said letters patent, together with the word "Patented" to be affixed with such Ticket Dispensers as have been manufactured by him or under his authority. That the said inventions are of great use and benefit and advantage to the public and the public has generally accepted and acquiesced in the plaintiff's exclusive rights thereto, and that except for the infringement herein complained of, and others of like character, the plaintiff would still be in the undisturbed possession, use and enjoyment of the exclusive rights and privileges secured to the plaintiff by said letters patent, and in receipt of all the gains and profits thereof.

V.

That the infringement hereinafter referred to by defendants and each of them, is depriving plaintiff of gains and profits, to which he is entitled under said letters patent, and said infringement is

an immediate and continuing injury to plaintiff and is a perpetual encouragement and inducement to others to infringe, and if said infringement is not enjoined as hereinafter prayed for, it will result in further loss and damage and irreparable injury to the plaintiff. [4]

VI.

Plaintiff further alleges that its products have at all times been manufactured with a view to meet the wants of the trade and that by means of the care and fidelity with which plaintiff has conducted his business and the manufacture of its products, the same have acquired a name and reputation in and with the trade throughout the United States and particularly within the States of Washington, Oregon, California, Montana and Idaho, and large quantities of the same are constantly used and are required from the plaintiff to supply the regular demand.

VII.

That for a period of more than eighteen months last past, the plaintiff has used a Ticket Dispensing Machine for selling collar buttons and other merchandise, and has used and established together with and in connection therewith a Ticket Dispensing Machine together with a display-board, having placed thereon other merchandise, and was first within the territory named to use said Ticket Dispensing Machine, and through a period of more than eighteen months firmly established the same in connection with his said business, and that during said period and prior to the wrongful acts of the

defendants as hereinafter set forth, the said Ticket Vending Machine and display-board had acquired a signification in the trade of the plaintiff; and that the plaintiff being the first person in the States of Washington and Oregon to use said method of advertising and promoting this business, and to use the said Ticket Vending Machine continuously and exclusively through the period of eighteen months prior to the wrongful acts of defendants hereinafter set forth; and during said entire period of eighteen months, the plaintiff has used said Ticket Vending Machine and display-board in all its business transactions, and plaintiff has expended large sums of money, to wit: the sum of Ten Thousand (\$10,000.00) Dollars in advertising and establishing the same in all the territory hereinafter named.

VIII.

Plaintiff further alleges that the defendants, having at all [5] times full knowledge of the above and foregoing facts, have wrongfully and unlawfully counterfeited and imitated said Ticket Dispensing Machine and display-boards for merchandise and is continuing to counterfeit and imitate said Ticket Dispensing Machine and Display-boards for merchandise unless enjoined and restrained by order of this Honorable Court.

IX.

That the wrongful and unlawful and unfair acts of the defendants as set forth in the above and foregoing paragraphs are herewith set forth with more particularity, and the more particular and especial acts of which the defendants have been guilty, and

of which they are still guilty, and of which they will continue to be guilty unless restrained and enjoined by this Honorable Court, are as follows:

A. Unfair, fraudulent and unlawful use of Ticket Vending Machines for selling Collar Buttons and other merchandise.

B. Unfair, fraudulent and unlawful use of Display-boards upon which merchandise is displayed.

C. Unfair, fraudulent and unlawful methods of procuring business.

D. That the purpose, intent and effect of the acts of defendant in the premises as above set forth were to appropriate and unlawfully infringe upon plaintiff's rights, and to cause the public to be confused and deceived into purchasing the products of defendants upon the strength of the popularity and reputation of plaintiff's products; and that the public, by reason of said unlawful acts and infringement, has been deceived and confused, giving to defendants an unfair advantage, and constituting an unfair competition and great damage to plaintiff thereby.

X.

The plaintiff further shows, as he is informed and believes, that the said defendants herein named well knowing all the facts hereinbefore set forth, having been duly and timely notified of the unlawful [6] acts aforesaid, are now constructing, selling and using Ticket Dispensing Machines substantially the same in construction and operation as in the said letters patent mentioned, and that notwithstanding the plaintiff has so notified the de-

fendants, they refuse to cease their wrongful acts, and have continued the same for a period of several months, and the plaintiff has been greatly injured and damaged thereby, and that all of said acts of said defendants are contrary to equity and good conscience and are a manifest wrong, injury and damage to the plaintiff, and that plaintiff has no adequate remedy in law and no speedy and adequate remedy and no remedy at all except through a court of equity.

XI.

That so it is, may it please your Honors, that the said defendants, as plaintiff is informed and believes, without license of plaintiff, against his will, and in violation of his rights have made, sold, and used, and intend to continue still to make, sell and use the improvement within the District of Oregon and elsewhere in the United States, and refuse to desist from the future infringement of said recited letters patent, all of which acts and doings are in violation of the exclusive rights and privileges so as aforesaid vested in plaintiff and by virtue of said recited letters patent number 1,268,222, and are contrary to equity and good conscience, and tend to the manifest injury of plaintiff in the premises.

XII.

That in cause number 8251 of the above-entitled cause, in the case of Joseph F. Dwyer vs. Enloe et al., the above-described patent was in issue and was the subject of adjudication in said cause, and the defendants therein were enjoined from making,

using and selling Ticket Dispensing Machines embodying said invention, and plaintiff was awarded damages against said defendants.

XIII.

That plaintiff is informed and believes that the employees of said Enloe, defendant in said cause number 8251, well knowing of the [7] violation of the rights of plaintiff, are conspiring to join with the defendants herein named and encouraging the infringement of said patent. That plaintiff prays the right to add additional defendants, including the employees of defendants as their names become known.

WHEREFORE, PLAINTIFF PRAYS:

1. That the defendants be required to answer this complaint, but not under oath, an answer under oath being expressly waived.

2. That a permanent injunction and also a preliminary injunction pending this suit be issued, restraining the defendants, their servants, agents and employees from indirectly or directly making or causing to be made, using or causing to be used, selling or causing to be sold, or threatening to make, use, or sell, any devices, structures or appliances employing or embodying the invention described in said letters patent number 1,268,222, and from infringing upon or contributing to the infringement of said letters patent in any way whatsoever.

3. For an accounting of profits, gains and advantages and an assessment of damages, and that any damages allowed may be tripled, and for a

decree directing the payment of said gains, profits, advantages and damages to the plaintiff.

4. For costs and disbursements of this action, and for such other, further and different relief as the proceedings of the case may require.

JOSEPH F. DWYER,

Plaintiff.

Verification. [8]

(Title.)

Order Granting Preliminary Injunction.

Order Granting Injunction Pending Suit.

THIS MATTER having come on for hearing this 27th day of March before the Honorable Charles E. Wolverton, District Judge of the above-entitled court; the plaintiff being present in person and represented by his attorneys, Roberts & Skeel, of Seattle, Washington, and defendants, Holsman and Harbaugh, appearing in person, and all of the defendants being represented by their attorneys, Joseph L. Atkins and Otto J. Kraemer, and the affidavits heretofore served having been introduced in evidence and other evidence having been introduced by the respective parties, and argument of counsel heard, and the Court being fully advised in the premises,

IT IS NOW HEREBY ORDERED:

(1) That upon this hearing for preliminary injunction there was introduced in evidence, by consent of the parties, a certain Ticket Dispensing

Machine, now in the custody of the Clerk of the Court, which has been made and used by defendant, General Novelty Co., and it appears to the Court that said Ticket Dispensing Machine infringes upon U. S. letters patent No. 1,268,222, to Joseph F. Dwyer.

(2) That the said defendant, General Novelty Co., its members, owners, copartners, officers, agents and employees are hereby restrained and enjoined, pending this suit or until further order of the Court, from making, constructing, using or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing Machine which employees or embodies the structure defined in the claims of plaintiff's United States letters patent No. 1,268,222; this order specifically includes any device similar to the defendants' device now in the custody of the Court.

(3) This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if [9] upon final adjudication it shall appear that defendants do not infringe the patents in suit.

(4) Plaintiff's surety bond in the sum of Twenty-five Hundred (\$2500.00) Dollars, filed herein at the time of the temporary restraining order is hereby discharged.

Done in open court this 27th day of March, 1919.

CHAS. E. WOLVERTON,

District Judge.

In compliance with said order of March 27, 1919, plaintiff deposited with the Clerk of the said United States District Court, United States Liberty Bonds in the sum of Ten Thousand Dollars (\$10,000.00).

(Title.)

Answer.

Come now the defendants, I. Holsman doing business under the name I. Holsman & Co., Lew Rubenstein, Paul Harbaugh, doing business under the name General Novelty Co., Ben Levin and Winnie Sullivan, and in answer to the bill of complaint:

I.

Admit that this suit is brought under the patent laws of the United States, but deny that the matter in controversy in this suit has any value whatsoever.

II.

Admit that the defendants are severally resident of Portland, County of Multnomah, State of Oregon.

Deny that the general Novelty Co. is a copartnership, and to the contrary allege that said name is merely that under which said defendant Paul Harbaugh does business, and that none of the other defendants have any interest in such business whatsoever, and said defendants, Lew Rubenstein,

Ben Levin and Winnie Sullivan are mere employees of said defendant, Paul Harbaugh. [10]

III.

Deny that Joseph F. Dwyer within the meaning of the statutes of the United States or otherwise, or at all, was the first, or sole, or true, or original inventor of any new, or useful improvement in Ticket Dispensing Machine, or not known or used before his alleged invention or discovery thereof.

That defendants are without knowledge as to whether said Dwyer on June 4, 1918, or at any time did duly make, or file an application in writing with the Commissioner of Patents of the United States for letters patent upon said alleged invention or improvement.

Defendants further deny that on June 4, 1918, or at any time, letters patent of the United States were duly issued for said alleged invention or improvement, or that thereby there was secured to said Dwyer, or his heirs or assigns, or he or they have, the full, or any, exclusive right to make, or use, or sell the said alleged invention or improvement.

IV.

Deny that any invention whatsoever is disclosed by said alleged letters patent, or that the device described in said alleged letters patent is of any value or importance.

Defendants are without knowledge as to whether the plaintiff has caused great quantities of said Ticket Dispenses to be manufactured, or put in use.

That defendants are without knowledge also as to

whether plaintiff has caused the date of said alleged letters patent, by itself or together with the word "patented," to be affixed on any of the ticket dispensers manufactured by plaintiff, or under his authority.

Deny that the said invention is of any use or benefit or advantage to the public, or that the public has generally or at all, accepted, or acquiesced in any alleged exclusive rights of plaintiff in the premises.

Deny that the plaintiff at any time was in the undisturbed possession, or use, or enjoyment of any exclusive rights, or privileges under said alleged letters patent. [11]

That defendants are without knowledge whether plaintiff has received any gains, or profits, under said alleged letters patent.

V.

Defendants deny that they have, or either of them has, in any manner infringed upon said alleged letters patent, or that plaintiff has been, or is, deprived by any act of defendants, or either of them, of anything to which he is entitled under said alleged letters patent.

Deny that anything done by defendants, or either of them, is any injury to plaintiff whatsoever, or is any encouragement, or inducement, to others to infringe upon said alleged letters patent; or that there is any cause for enjoining any act of defendants whatsoever.

VI.

Defendants are without knowledge as to how, or

in what quantity, or for what purpose any products of plaintiff have been, or are being manufactured, or whether there is any demand by the trade therefor.

Deny that plaintiff's business or manufacture or products have required a name or reputation in or with the trade, or in any place.

VII.

Deny that plaintiff was the first person to use, in any place, a vending machine, or display-board, as a method of advertising, or for promoting any business; or that plaintiff at any time, or for any period had any continuous, or exclusive, use of said devices, or method, or either thereof.

Defendants are without knowledge as to how plaintiff has used said Ticket Vending Machine, or whether he used the same at all, or whether plaintiff used a display-board in his business transactions, or at all, or whether plaintiff has expended any sum for advertising, or for establishing the same, in any place, or otherwise.

VIII.

Defendants deny any knowledge of any fact alleged in the bill except as in this answer expressly admitted.

Deny further that they have wrongfully or unlawfully counterfeited or imitated, said, or any, Ticket dispensing machine, or display-board, [12] for any purpose, or that defendants are, or either of them is now doing so.

IX.

Deny that they have, or either of them has, been guilty of:

A. Any unfair or fraudulent, or unlawful act whatsoever, or unlawful use of a Ticket Vending machine for any purpose;

B. Or, of any unfair, or fraudulent, or unlawful use of a display-board upon which merchandise is displayed, or otherwise;

C. Or, of any unfair or fraudulent, or unlawful method of procuring business;

D. Or, that the defendants have, or either of them has, been guilty of any act or conduct, whatsoever, having for its purpose, or intent, or effect to appropriate, or unlawfully infringe upon any right of plaintiff; or to cause the public to become confused, or deceived into purchasing any products of defendants upon the strength of the popularity, or reputation of plaintiff's products; or that the public by reason of any unlawful act of defendants or either of them have been deceived, or confused, or giving the defendants any unfair advantage, or constituting any unfair competition, or causing any damage to plaintiff whatsoever.

X.

Defendants deny that either of them has been, or is constructing, or selling, or using any Ticket Dispensing Machine substantially or at all, the same in construction, or operation, as in said alleged letters patent described, or claimed; or that the plaintiff has suffered any injury, or damage by any unlawful act of the defendants whatsoever, or that any of the

defendants has been guilty of any act in the premises contrary to law, or equity, or good conscious, or a wrong or damage to the plaintiff in any respect whatsoever.

Defendants further deny that plaintiff has any cause or complaint in law or equity against these defendants whatsoever, or either thereof for anything done by the defendants or either of them.
[13]

XI.

Defendants further deny that they intend to make, or sell, or use in any place, the alleged improvement described in said alleged letters patent, or that either of them has done or purposes to do any act, or thing whatsoever in violation of any exclusive right or privilege vested in the plaintiff, or contrary to law, equity or good conscience, or tending to any injury of the plaintiff in the premises.

XII.

Defendants deny that in a cause Number 8251, entitled "Joseph F. Dwyer, vs. Enlow et al," or in any other suit or action, the above described patent was in issue, or was the subject of adjudication or was adjudicated; defendants are without knowledge as to the alleged other proceedings in said suit.

XIII.

Defendants deny that they are conspiring with anyone, or that anyone is conspiring with them, for encouraging the infringement of said alleged patent or any other purpose whatsoever.

XIV.

Defendants deny that in order to adequately, or at

all, protect any rights of the plaintiff, it is necessary that a preliminary injunction be issued pending this suit, or that a perpetual injunction be issued to restrain any act of either of defendants in the premises.

XV.

And for further and separate answer, the defendants allege.

That the device described in said alleged letters patent, does not contain or involve any patentable invention, but shows merely obvious mechanical contrivances, well known to, and in the possession of, the public long before the alleged invention thereof by plaintiff.

XVI.

And for a further and separate defense allege:

That the alleged invention described in said alleged letters patent, relates to an art well and highly developed long before said plaintiff entered the field with his said alleged improvement, as is [14] shown by the following letters patent of the United States to wit:

Whitaker, et al.	June 11, 1872	#127,722
Shoup	Oct. 9, 1883	286,493
Kirk	March 2, 1897	577,862
Springsteen	Aug. 29, 1899	632,070
McCourt, et al.	Aug. 9, 1904	767,233
McCourt, et al.	Jan. 23, 1906	810,791
Connors, et al.	June 11, 1912	1,029,490
Walsh	Oct. 6, 1914	1,112,501

That, therefore, the alleged improvement of plaintiff, if it did constitute an invention, was of a very

specific and limited character, and must be so construed in order not to encroach upon the rights which were vested in the public at the time plaintiff entered said field.

That when said application for said alleged letters patent came up for examination before the Commissioner of Patents of the United States, the said application contained the following claims in addition to those now contained in said alleged letters patent, to wit:

A ticket-dispenser comprising a receptacle, an inclined shelf formed on one side of said receptacle and provided with ticket receiving grooves that communicate with the interior of said receptacle by slots, fixed ribs separating said grooves; a transparent plate adapted to rest on said ribs and cover said grooves whereby the tickets contained in said grooves will be visible; and means for supporting ticket rolls within said receptacle whereby the tickets may be dispensed through said grooves.

A device for dispensing tickets from a ticket roll comprising a receptacle; and inclined shelf on one side and provided with grooves that communicate with the interior of said receptacle and are adapted for the reception of tickets, the side of said receptacle being cut away adjacent the outer ends of said grooves to provide finger recesses; fixed spacing ribs separating said grooves a transparent plate adapted [15] to rest on said ribs and cover said grooves; a shaft for supporting ticket rolls within said receptacle, whereby the tickets may be dispensed through said grooves; means for spacing said ticket rolls

apart on said shaft; and tension devices for permitting said tickets to be withdrawn from said receptacle but preventing said tickets from being pushed back into said receptacle.

A device for dispensing tickets from a ticket roll comprising a receptacle having grooves through which the tickets may be withdrawn, of means within said receptacle for supporting rolls of tickets, and tension means for yieldingly engaging said tickets and permitting said tickets to be withdrawn from said receptacle, said tension means being adapted to prevent said tickets from being pushed back into said receptacle.

That said Commissioner rejected said claims on the ground that the invention therein described lacked patentable novelty in view of the disclosures made by the above specified prior letters patent; and that thereupon said Dwyer acquiesced in said judgment of the Commissioner of Patents, and in compliance therewith canceled said claims from his application, in order to distinguish his alleged invention from said prior art as described by said prior patents, and restricted himself to the specific claims now appearing in the said alleged letters patent; all of which facts appear on the face of the file-wrapper, or record, of the application of plaintiff for said letters patent, a certified copy of which, together with copies of said prior patents (the latter also duly certified if required) will be duly proffered in court.

XVII.

And the defendants further answering allege:

That the alleged letters patent in the bill of complaint referred to are, and always have been void, for the reason that the alleged improvement therein described was well known, and in public use in the United States, long before the alleged invention thereof by the plaintiff; and the defendants are now making a further search with regard to said [16] prior knowledge and use by the public and will disclose the same by amendment to this answer, or otherwise, as the Court may direct, upon having ascertained said facts.

XVIII.

And the defendants, Lew Rubenstein, Ben Levin and Winnie Sullivan, for a further and separate defendants allege;

That they are merely employees of the defendant Paul Harbaugh, and never had, nor now have, any interest whatsoever in the matter set forth in the bill, and have no knowledge of said matter, save as they are informed by said bill; and all allegations of the latter as against these defendants are wholly untrue and false in fact.

XIX.

And the defendants further answering allege:

That neither of the defendants, excepting Paul Harbaugh manufactured any Ticket Merchandise Dispensing Machine. That the machine so manufactured by the defendant Harbaugh, embodies new and original devices and combinations as defendants verily believe on which the said defendant Harbaugh has made an application for letters patent of the United States which application is pending before

the Commissioner of Patents; and, if there is any resemblance in the outward appearance of the device manufactured by defendant Harbaugh, with that manufactured by plaintiff it is due solely to physical and structural requirements common to said device.

That, furthermore, the said Harbaugh in placing his machine on the market has carefully marked the same with the trade name "General Vender" in conspicuous letters appearing on the face of the machine; and also marked the face of his said machine with the name "General Novelty Co.," each of said markings being adopted by said defendant Harbaugh for the express purpose of distinguishing his said machine from any other machine on the market to his knowledge; and that there never was, or could be, any confusion of the vending machine of said Harbaugh, with the vending machine described by said alleged letters [17] patent, or that made by the plaintiff, nor would one be substituted for the other by any one desiring to purchase one in preference to the other, and exercising ordinary care in his selection.

XX.

And the defendants further allege:

That the plaintiff is seeking to establish a monopoly in the use of a vending machine, either by itself or in connection with a display-board such as commonly in use, and is attempting to drive said defendant Harbaugh out of said business and to prevent him from manufacturing any vending machine, or competing with the plaintiff in the sale of merchandise similar to that sold by the plaintiff. And instead of the defendants or either of them, being

guilty of any unfair competition in the premises whatsoever, the plaintiff is seeking to bring about an unfair restraint on said Harbaugh's business, and the sale of his merchandise.

XXI.

And the defendant Paul Harbaugh further and separately answering the bill, alleges that the plaintiff is well aware that the defendant Harbaugh has gone to great expense in the manufacturing of his, said Harbaugh's own Ticket Dispensing Machine, all of which expenses will be an absolute loss to the defendant Harbaugh, would work an irreparable damage and hardship on him if he were not permitted to use his said machine merely because of physical requirement, there is a remote resemblance between the exterior of the vending machines made by the defendant Harbaugh and that made by the plaintiff.

Having thus made full answer to the matters and things contained in the bill: The defendants pray that the bill be dismissed, and for judgment for the cost and disbursements by them incurred.

I. HOLSMAN.

PAUL C. HARBAUGH.

OTTO J. KRAEMER.

JOS. L. ATKINS. [18]

T. J. GEISLER.

WINIFRED SULLIVAN,

LEW RUBENSTEIN,

Per T. J. G.,

BEN LEVIN,

Defendants.

Verification. Filed May 23, 1919.

Memorandum Re Supplemental Answer.

By consent and the permission of the Court, the defendant, Paul C. Harbaugh filed a supplemental answer in which he set forth the granting to him on May 11, 1920, of letters patent No. 1,339,823, for Ticket Dispensing Device, on an application filed in the United States Patent Office Feb. 13, 1919, serial No. 276,806.

(Title.)

Opinion.

The Opinion of District Judge R. S. BEAN, Filed December 20, 1920, Dismissing the Suit.

ROBERTS & SKEEL, Seattle, Washington, Attorneys for Plaintiff.

T. J. GEISLER, Portland, Oregon, Attorney for Defendant.

R. S. BEAN, D. J.

This is a suit for an infringement of patent number 1,268,222, for a new and useful improvement in devices for dispensing tickets from a roll in a receptacle or box, issued to the plaintiff on June 4, 1918.

The plaintiff's original application contained five claims. Three of these were rejected by the patent office by reference to prior patents. Substantially the only new element in the claims as allowed consists in the manner of separating the ticket rolls. This is accomplished by a removable back for a re-

ceptacle "and guide members fixedly secured to said removable back wall adapted to be inserted between the ticket rolls on said shaft to hold said ticket rolls in spaced apart relation." Harbaugh does not use the roll or partition for separating the tickets but in his device the tickets are folded into packs and placed in separate pasteboard boxes so that in dispensing them one pack will not interfere with the other.

The claims of plaintiff's patent as allowed can not be construed to cover what was rejected by the Patent Office. (Knapp vs. Morse, 150 U. S. 221; Anthony vs. Gennert, 99 Fed. 95.) His patent, if valid at all is a [19] very narrow one consisting of but a slight improvement in the art. It must therefore rest upon the novelty of the specific means adopted to carry his idea into practical application. He is not entitled to a monopoly of analogous means. His patent covering, as it does, the combination of old elements with a new limited feature is confined to his specific device and can receive but little aid from the doctrine of equivalents. Where as here the patent depends upon a limited feature the doctrine of equivalents will not ordinarily be applied so as to cover a device in which that feature does not appear. (Broadway Towel Co. vs. Brown-Meyer Co., 245 Fed. 659; Anthony vs. Gennert, *supra*; Liberman's Ex vs. Ruwell, 165 Fed. 208; Miller vs. Eagle Mfg. Co., 151 U. S. 186; Barley vs. Witt & Co., 261 Fed. 77; Masteras vs. Hildreth, 263 Fed. 571; Logan vs. Baxter, 264 Fed. 514.) The method of separating tickets as disclosed by the Harbaugh

patent is not used by the defendant and therefore is not an infringement of plaintiff's patent although it accomplishes the same object by other means. (*Westinghouse vs. Boyden Power Brake*, 170 U. S. 537-568.)

There is another reason why I am inclined to think the Court should decline to grant plaintiff relief. If plaintiff's device is not a lottery or gambling device it borders closely thereon. It is the element of chance in its operation which gives it value and hence I doubt whether a court of equity, on grounds of public policy, should assume to protect him in a monopoly thereof.

(Title.)

Decree.

The Decree Entered December 20, 1920, Dismissing the Suit.

This cause came on to be heard at this term and was argued by Roberts & Skeel of Seattle, Washington, of counsel for plaintiff, and T. J. Geisler, of Portland, Oregon, of counsel for defendants; and thereupon, upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED as follows, viz.:

That there is no infringement on the part of the defendants of plaintiff's patent, and the plaintiff is not entitled to any relief. This cause is therefore dismissed, and defendants are entitled to their cost and disbursements to be taxed by the clerk of this Court.

Dated: Portland, Oregon. Dec. 20, 1920.

R. S. BEAN,
District Judge. [20]

(Title.)

Petition for Correction of Decree.

The Petition Filed by Defendant Paul C. Harbaugh,
Dated Jan. 14, 1921, and Duly Verified, for Cor-
recting Said Decree of Dec. 20, 1920.

To the Judges of the Above-named Court:

The petition of Paul Harbaugh, one of the above-named defendants, respectfully shows:

That this suit was brought by plaintiff against defendants for the alleged infringement by them of an alleged patent issued to the plaintiff June 4, 1918, No. 1,268,222 or alleged improvement in Device for Dispensing Tickets.

That at the time of bringing said suit your petitioner had manufactured, and was using also, in large quantities, a Merchandise Selling Device, and had expended large sums in connection therewith. That said alleged patent of plaintiff is and always was invalid, because not granted for any patentable improvement, and furthermore said device of defendant in nowise infringed upon said alleged patented device of the plaintiff; but nevertheless the plaintiff did represent to this Court that the defendant's said device did infringe upon said plaintiff's alleged patent, and claimed that because defendant was carrying on a similar business as that carried

on by plaintiff, by means of said devices, the defendants were infringing upon the exclusive rights of plaintiff in the premises; and upon such allegations the plaintiff did induce District Judge Wolverton to grant plaintiff on or about March 27, 1919, an injunction pending the trial of this suit, restraining the defendants, and each of them, their agents and employees, until a further order of the Court, from making, constructing, using, or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing Machine like that which the defendant, General Novelty Co., was using at that time. That the granting of said temporary injunction was conditioned however upon the plaintiff complying with the following clause in said injunction order, to wit:

“This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu [21] thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patents in suit.”

That thereupon the plaintiff in order to render said temporary injunction of this Court effective, and to put the same into force, did deposit with the Clerk of this Court, U. S. Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars, for the express purpose of securing the defendants

against any damage which may be awarded to them, if upon final adjudication it should appear that defendants' said device did not infringe the said alleged plaintiff's patent which was here in suit.

That thereafter upon a full hearing of this cause before the Honorable R. S. Bean, district judge, the Court found that the device used by defendants did not infringe upon said alleged patent of plaintiff, even if said patent is valid, and that the plaintiff is not entitled to any relief, and therefore dismissed this cause.

That by reason of the defendants, General Novelty Co., and your petitioner, Paul Harbaugh being restrained by said temporary injunction during the pendency of this suit they sustained great and irreparable damage, and, furthermore, while defendants were so restrained the plaintiff was enjoying a monopoly of the business in which he had no exclusive rights. That the fact that the express purpose of plaintiff in inducing this Court to grant said unlawful injunction was that plaintiff might profit by the monopoly which plaintiff so inequitably and unlawfully obtained of said business. And that plaintiff did make large sums of money by reason of such monopoly and of the exclusion of defendant from the field, notwithstanding defendants had as much right to be in said field as did the plaintiff; and thus the defendants not only suffered great loss, but the losses which defendants so sustained by reason of their unlawful restraint in business, as [22] aforesaid, resulted in great profits to the plaintiff,

which profits would not have been made but by said unlawful enjoining of defendants.

That the damage and loss which defendant so sustained by reason of the plaintiff wrongfully obtaining said temporary injunction far exceeds the said \$10,000.00 par value of said Liberty Bonds.

That in entering the decree of dismissal herein the defendants inadvertently omitted to include in such decree any direction of this Court with regard to the ascertaining of the damage sustained by defendants by reason of said wrongful temporary injunction, and for the application of the said security, now still deposited with the Clerk of this Court, towards the remedying and relief of the injuries and damage which the defendants sustained as aforesaid.

That therefore your petitioner prays on behalf of himself and his codefendants that the decree of dismissal entered in this cause under date of Dec. 20, 1920, be amended in conformity with rules 72 and 19 of the Rules of Practice in Equity by adding to said decree in substance the following direction, in order to protect all rights and remedies of the defendants in the premises in conformity with equity, to wit:

Vacating and setting aside the said temporary injunction so wrongfully granted to plaintiff in this suit; reserving the matter of ascertaining the damages sustained by defendants or either thereof because of said temporary injunction for such further proceedings and decree in this suit as to the Court may seem meet; and directing that the \$10,000.00

par value of Liberty Bonds deposited with the Clerk of this Court to indemnify the defendants against damage due to said wrongful injunction be retained in the hands of the Clerk to abide the further order and decree of the Court in the premises.

And your petitioner further prays: That thereupon the defendants and each of them may file their petition in this Court for the damages sustained by them, or either of them, by reason of said injunction so unlawfully obtained by plaintiff against defendants in this [23] suit, and that thereupon this Court direct the mode and manner in which such damages be determined; and that the amount so ascertained be satisfied as far as possible out of the sum obtainable from said Liberty Bonds on deposit with the Clerk of this Court; and that the Defendants may have such further order and relief in the premises as may be just and equitable.

Dated: Portland, Oregon. January 14, 1921.

PAUL C. HARBAUGH,
Petitioner.

T. J. GEISLER,

Of Counsel for Defendants and Petitioner.

Verification. Filed January 17, 1921.

(Title.)

Petition to Have Damages Determined.

The Petition Filed by Defendant, Dated Jan. 15, 1921, Duly Verified, for Determining damages Sustained by Defendants by the Wrongful Temporary Injunction Issued in This Suit.

To the Honorable the Judges of the Above-entitled Court:

The petition of the above-named defendants respectfully shows:

That this suit was brought by plaintiff to restrain the defendants from an alleged infringement of alleged letters patent of the United States, issued to plaintiff June 4, 1918, No. 1,268,222, for Device for Dispensing Tickets, and also to recover damages for said alleged infringement by defendants.

That at the time of the bringing of this suit the plaintiff moved for a temporary injunction pending the trial of this case, enjoining the defendants and each of them, from making, using, or selling, or permitting others so to do, any Ticket Selling Devices which employs or embodies the structure defined in the claims of the said alleged patent, or any device similar thereto.

That the defendants resisted said application for temporary injunction by the plaintiff and to that end employed counsel, also appeared in Court and submitted the particular device which they, the [24] defendants were using; that the hearing of said application coming on before the Honorable Charles E. Wolverton, District Judge, the plaintiff

did then and there represent that he was entitled to a broad interpretation of the claims of his said alleged patent, and did then and there insist that while the defendants' device was not made specifically as the claims of said alleged patent prescribed, nevertheless, defendants' device and all similar thereto were within the terms of plaintiff's patent.

That the broad construction which plaintiff so contended for as covered by his said alleged patent had, in fact, been previously contended for before the honorable commissioner of patents in the presentation of plaintiff's application for his said alleged patent, to the knowledge of the plaintiff, and been considered by the said United States Commissioner of patents, but had been rejected by the latter, and plaintiff was restricted to the specific claims which appear in his said alleged patent. That notwithstanding such knowledge on the part of the plaintiff he concealed such facts from said Judge Wolverton, and thereby misinformed and induced the Court to enter a temporary injunction order containing the following provision and prohibition:

“That the said defendant, General Novelty Co., its members, owners, copartners, officers, agents and employees are hereby restrained and enjoined, pending this suit or until further order of the Court, from making, constructing, using or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing machine which employs or embodies the structure defined in the claims of plaintiff's United States letter patent No. 1,268,222;

this order specifically includes any device similar to the defendants' device now in the custody of the Court."

That the said District Judge, in said injunction order, and acting within the discretion in him vested, did incorporate the following clause, with which the plaintiff was required to comply in [25] order to make said injunction effective, that is to say, said injunction order provided as follows, to wit:

"This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patents in suit."

That thereupon the plaintiff deposited with the Clerk of this Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars, for the purpose of rendering said injunction order effective, and thereupon the defendants did faithfully obey the said injunction order to their great damage, however, as hereinafter stated.

That thereupon this cause was brought to trial before the Honorable R. S. Bean, District Judge. And thereupon the Court upon being fully advised did find that the plaintiff was not entitled to any relief, and did enter its decree Dec. 20, 1920, dismissing this suit, and thereupon the question of any damages

sustained by the defendants or either thereof, by reason of said temporary injunction wrongfully issued in his suit against the defendants was referred to ———, Master, to ascertain the facts and report thereon to this Court for its further order and decree in the premises.

That at the time of the bringing of this suit the defendant Paul Harbaugh, doing business under the name General Novelty Co., had manufactured in large quantities, and was using a certain merchandise Selling Device, and in order to do business therewith, had purchased large quantities of merchandise especially adapted for being sold in connection with such devices, and had also expended large sums of money in connection therewith, to wit, about \$5,000.00.

That the defendant, Paul Harbaugh, being a large competitor of the plaintiff, who was engaged in a similar business as said defendant [26] Harbaugh, the plaintiff brought this suit for the express purpose of obtaining an unlawful and inequitable monopoly of the said business and of preventing the defendant Harbaugh, and those associated with him to exercise the lawful rights which they had in carrying on their said business; and that by obtaining said temporary injunction the plaintiff did procure for himself an unlawful monopoly, and did particularly prevent defendant Harbaugh and those associated with him from carrying on a business similar to that of plaintiff, and thereby the defendants did suffer great damages, namely, the goods and merchandise which defendant Harbaugh had purchased

for the express purpose of using in connection with his said merchandise selling devices which were especially chosen and adapted for such purpose and therefore when defendant Harbaugh was not permitted to use his own merchandise selling devices the said merchandise which he had bought to use in connection with the latter became deteriorated in value and had to be sold at a loss of about \$2,000.00.

That had defendant Harbaugh been permitted to carry on his said business without the restraint of said temporary injunction order he would have realized out of his business the profits amounting to the sum of about \$25,000.00.

That defendant had his business, at the time when enjoined, well established, and that prior to his being enjoined to use his said Merchandise Selling Devices, his business was bringing him a net profit of about \$1,200.00 per month.

That by reason of the plaintiff, thru his misrepresentation of the facts to this Court and concealing from the Court the true facts concerning his said alleged patent, and the claims thereof, and the scope of such claims, the plaintiff unlawfully and inequitably succeeded in producing for himself a substantially exclusive monopoly and made large sums of money, the amount of which defendants can not state at this time, but hereafter will have endeavored to establish, and which money so made because of plaintiff's unlawful monopoly, represented to [27] a large extent the profits which defendant Harbaugh would have made if his lawful rights had not been interfered with by said wrongful tempo-

rary injunction herein issued, and which profits furthermore, the defendant Harbaugh would have made in lawful competition with plaintiff in those places and localities where both plaintiff and defendant were operating their merchandise selling devices and selling their goods prior to the commencement of this suit.

That furthermore defendants were obliged to and did hire counsel to defend themselves in this suit, and against said wrongful temporary injunction, and paid their attorneys the sum of \$500.00 which was the reasonable value of the services necessarily rendered by said attorneys in protecting the rights of the defendants in the premises.

Wherefore, your petitioners pray that the Court may ascertain the damages which the defendants and each of them incurred in this suit by reason of said wrongful temporary injunction, and that the plaintiff be required to pay the sum so found to the defendant in accordance with the directions of this Court, and that the security to wit, the Liberty Bonds in the par value of Ten Thousand (\$10,000) Dollars now on deposit with the Clerk of this Court as aforesaid, be applied in satisfaction of the damages so awarded by this Court in the premises, and that the defendants and each of them may have such other and further relief in the premises as may to the Court seem just.

Dated: Portland, Oregon. January 15, 1921.

T. J. GEISLER,

Attorney and of Counsel for Defendants.

PAUL C. HARBAUGH,

One of the Defendants.

Verification. Filed January 17, 1921.

(Title.)

**Order Correcting Decree and Granting Reference
to Master.**

The Order Entered Jan. 17, 1921, Correcting Said
Decree of December 20, 1920, and Granting
Reference to Master.

The petitions of the defendant, Paul Harbaugh,
verified January 14, 1921, and January 15, 1921, re-
spectively, came on to be [28] heard at this term,
and was argued by counsel for the respective par-
ties, and thereupon, upon consideration thereof, and
the stipulation of the parties, dated January 4, 1921,
it is

**ORDERED, ADJUDGED AND DECREED, as
follows:**

That the decree herein entered before the date of
December 20, 1920, be and the same is hereby cor-
rected by adding thereto the following:

And it is further **ORDERED AND DECREED**
that the injunction order herein entered on or about
March 27, 1919, be and the same is hereby vacated,
and the injunction thereunder be and the same is
hereby dissolved.

And it is further ORDERED that the matter of ascertaining what, if any, damages the defendants, or either of them, sustained by said injunction order be referred to Robert F. Maguire, Esq., the Standing Master of this court, to ascertain the facts and report to this Court his findings in the premises with all convenient speed.

And it is further ORDERED that due notice of all hearings before the said Master be given to plaintiff, who may also submit testimony at such hearing, if he so desire, on said question of damages, and the said Master is directed to proceed in said hearing before him in conformity with the Rules of Practice in Equity.

And it is further ORDERED that the Liberty Bonds heretofore deposited with and now in the custody of the Clerk of this court in this cause, which deposit was made by plaintiff to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it should appear that the defendants did not infringe the patent in suit, in compliance with the provision contained in, and as a condition precedent to the making of said injunction order effective, be retained in such custody, and subject to the further order and decree of this Court herein.

Dated: January 17, 1921.

R. S. BEAN,
Judge. [29]

Memorandum Re Appeal from Decree, etc.

Appeal was duly taken by the plaintiff from said decree of Jan. 20, 1920, and the order of Jan. 17, 1921, correcting said decree; but said appeal was later dismissed by the Circuit Court of Appeals for the Ninth Circuit because the appellant failed to print the record in compliance with Rule 23 of the Appellate Court.

(Title.)

Report of Master on Damages.

The Report of the Master on Reference to Him
as to Damages Sustained by the Defendants.

Filed June 5, 1922.

On March 22d, 1919, the plaintiff brought the above-entitled suit, and on March 27th, 1919, obtained a preliminary injunction restraining defendants from issuing or using a certain ticket dispensing machine which plaintiff claims was an infringement of his patent. The injunction was issued upon condition that the plaintiff deposit the sum of \$10,000.00 to secure the payment of any damages which may be accorded the defendants in the event that they did not infringe upon the patent in suit.

A trial of the issue was had and the Court dismissed the plaintiff's bill upon the specific finding that defendants' device did not infringe his patent. The matter has since been referred to the Master to assess the defendants' damages. Hearing has

been held and testimony taken, copies of which and the exhibits offered at the hearing are submitted with the Master's report.

The plaintiff urges the following objections to the assessment of damages:

1. That the imposition of damages is discretionary.

2. That the device is a gambling device and for that reason no damages should be assessed against plaintiff.

3. That the defendant Harbaugh cannot recover on the ground that he is not the real party in interest.

4. That there has been a violation of the injunction which precludes any right to damages.

The Master has not considered in his report the first of these [30] objections for two reasons: First, that the Court's order to him directs him to assess damages if any sustained, and second, that the evidence does not disclose that degree of good faith on the part of the plaintiff in obtaining the injunction to warrant the exercise by the Court of any discretionary power. The testimony clearly shows that the plaintiff and defendants had a practical monopoly of the field in question, and that by the issuance of the injunction there flowed to the plaintiff all the profits of the business.

In determining whether or not the defendants can recover at all the Master has experienced considerable difficulty. Both plaintiff and defendants admit that the device used by them in their respective business was in fact a gambling device, and

in addition to the suggestions found in your Honor's opinion the Supreme Court of Washington in the case of

Dwyer vs. City of Seattle, 199 Pacific 740, holds that it is an ingenious device which is intended to and did appeal to the gambling instincts of the community, and clearly falls within the prohibition of the gambling statute.

Both parties admit that the owner of a gambling device or gambling house could not recover damages for profits lost by reason of interference with this unlawful business. The defendant, however, takes the ground that by obtaining this unlawful injunction the plaintiff is now in possession of profits, which otherwise would have accrued to the defendant, and therefore plaintiff is the defendant's trustee *ex maleficio* of the same, and having voluntarily given bonds to account for these profits he will not be permitted to retain these trust funds, which came into his possession through abuse of legal process.

It has long been the rule that for infringement of patent rights the plaintiff is entitled to recover the amount of gains and profits that the defendant has made by his unlawful use of plaintiff's invention: [31]

Tilghman v. Proctor, 125 U. S. 136, 145;

Westinghouse Company vs. Wagner Company,
225 U. S. 604, 618.

These and the cases therein cited proceed upon the theory that the infringer by reason of his wrong has received funds in the nature of gains and

profits which in equity belong to the patentee. In the present case the situation is reversed. We have two people enjoying a monopoly of the business, each claiming under separate patents. The plaintiff by use of a restraining order unlawfully bars the defendant, his competitor, from the field, and thereby obtains profits, which otherwise would have been the defendant's. A question arises as to whether or not the rule invoked in the case above-mentioned applies in a suit disclosing the fact last described.

There does not seem to be any good reason why it should not, unless the fact that these funds arose from the use of a gambling device bars any recovery whatsoever.

It is to be remembered that these parties were not partners in an unlawful business, that the moneys received did not arise from any prohibited or unlawful contract between them. The defendant's claim for damages to his business has been abandoned and he now claims an accounting for the profits which he says the plaintiff obtained which in fact belonged to him.

The Court in compelling the plaintiff to so account does not thereby give vitality to any illegal contract or agreement between the parties or to any illegal contract which they may have made independently of each other. These profits if they exist, are now a fund in the plaintiffs hands. The transactions have long since been closed, and the Master is of the opinion that the case of *Martin vs. Brooks* (69 U. S.), 2 Wall, 70, is directly in point,

and its principles govern this case. This was a suit for an accounting between parties who had been engaged as partners in the business of purchasing returned soldiers' warrants in violation of the Act of Congress. The transactions had long been closed, and a large sum of money had been [32] realized therefrom which was in the hands of one of the partners, who refused to account. As a defense he set up the fact that the purposes of the partnership were unlawful and that a court of equity would not step in to enforce its terms, but would leave the parties as it found them. In its opinion the Court says:

“Does it lie in the mouth of a partner who has by a fraudulent means obtained possession and control of all these funds to refuse to do equity to the other partner, because of the wrong originally done or intended to the soldiers? It is difficult to see how the statute enacted for the benefit of the soldiers is to be rendered any more effective by leaving all this money in the hands of Brooks instead of requiring him to do exact justice as between himself and his partner, but what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts and cannot be affected by any action of the court in this case. * * *

“The difference between enforcing illegal contracts and asserting the title to money which has arisen from them is distinctly taken in *Tenant vs. Elliott*, 1 Bos. & P. 3, *Farmer vs. Russell*, 1 Bos. and P. 29, and recognized and approved by Sir William Grant in *Thompson vs. Thompson*, 7 Ves. 473.”

It is true that the Supreme Court in the later case of *McMullen vs. Hoffman* (174 U. S. 639), 43 L. Ed. 117, held that it would not extend the doctrine of the case of *Martin vs. Brooks*, and refused to permit an accounting between partners who had by collusive bids obtained public contracts. The Supreme Court, however, in the last named case clearly holds that a Trustee or third person having funds belonging to another cannot set up the illegal source of such funds.

Dwyer was not a partner of Harbaugh, but a competitor, by his wrongful use of the Court's injunction there have come into his hands funds which belong to the defendant. His possession of the same resulted not from the agreement on Harbaugh's part, but against his wishes, and by reason of an order of the Court which Dwyer himself obtained.

Had Harbaugh placed these funds in the hands of a third person there could be no question as to his right to recover, irrespective of the source of their derivation. If they had been stolen the thief could have been prosecuted, and why should one who has deposited [33] bonds at the instance of the Court to answer for damages by reason of an im-

proper writ be permitted to avoid the penalty when its impropriety has been established by a decree of the Court.

The Master, therefore, finds:

That the fact that the device is a gambling device does not bar the defendant Harbaugh from recovering any profits which Dwyer obtained by reason of the restraining order and that as to those profits Dwyer is in the position of a trustee *ex maleficio*.

The next objection raised by the plaintiff is that Harbaugh is not such a party in interest as will sustain a right to recovery

Harbaugh is a patentee. He testifies that no one else at the time of the institution of the suit was interested in the patent or in the business which he conducted, but that thereafter he entered into an arrangement whereby the profits of this business were pooled with profits which might be derived from various other businesses run by one Holsman, one Flatow and one Savan. There were circumstances in the case which throw considerable suspicion upon his statements. Practically all of the merchandise used was purchased through Holsman, upon a portion of it Harbaugh paid only costs. The boxes which the defendant attempted to substitute in place of those enjoined were originally ordered and paid for by Holsman, although it is claimed that he was reimbursed therefor by Harbaugh. Large payments were made to Holsman in excess of moneys due him. The assumed business name certificates filed by Harbaugh were filed at the same time that assumed business name certificates

were filed by Flatow and Savan wherein each of them claimed to be the sole owners of certain jewelry businesses when in truth and in fact Holsman was a silent partner, and finally the four men pooled their profits from all these businesses.

But these circumstances, while suspicious, the Master does not believe are sufficient to overcome the direct and positive testimony of each of them to the effect that Harbaugh was and is the sole owner of the patent, and of the business arising therefrom. [34]

Nor does the fact that he has agreed to pool the profits of his business give rise to a defect in parties to this suit.

In *Tilghman vs. Proctor*, *supra*, the plaintiff's brother testified before the Master that he had acquired an interest in all license fees and recoveries under the patents. Neither the nature nor amount of this interest was definitely stated, and although the defendants there urged that plaintiff could recover his share only, the Supreme Court held that:

“Interest in the net proceeds of collections under the patent does not necessarily amount to legal ownership of the patent itself. It is plain therefor, as the case appears that there has been no want of joinder of the necessary parties.”

FINDINGS.

The Master finds that the defendant Paul Harbaugh is the real party in interest in this suit, and that there is no defect in parties.

Question 4. The Violation of Injunction by the Defendant.

It appears from the testimony that after the issuance of the restraining order the defendant Harbaugh received from time to time various remittances from merchants in whose possession boxes had been placed prior to the issuance of the injunction, and that these merchants in many cases refused to return these boxes when requested to do so, by Harbaugh's traveling salesman. There is no testimony, however, to indicate that the defendant put into use any of these boxes after being prohibited from doing so, or that he furnished new merchandise or new rolls of tickets or did anything other than accept the money from the consignees of boxes placed in their possession prior to the date of the restraining order. It is extremely doubtful whether the receipt of the money was a violation of the Court's order, but in any event it was trifling in nature, and does not evidence any bad faith or intention to violate the injunction on the part of the defendant.

FINDINGS.

The Master finds that there was no material violation of [35] the restraining order by the defendant.

AMOUNT OF DAMAGES.

The evidence shows that during the 45 days immediately prior to the issuance of the injunction that the defendant was doing a large volume of business. From the boxes put in the hands of dealers during that period the defendant received the sum of \$11,256.00. Mr. Harbaugh testified that

the merchandise sold with these boxes cost approximately \$50.00 a box, amounting to \$5,633.00; that the amount paid salesmen was \$1,213.19; that incidental expenses amount to \$765.00, making a total expense of \$7,611.19, and a net profit of \$3,644.81, or a daily profit of approximately \$80.99.

It may well be as contended by plaintiff's counsel that there was no absolute certainty that these profits would continue in like amounts, but in all business the volume and profits fluctuate. If a generous allowance be made for fluctuation there can be no doubt that the defendant would have realized a profit of at least \$1,500.00 per month.

It is not necessary, however, for the Court to rest upon the figures given by the defendant, for the burden rests upon the plaintiff to account and show what portion of the profits he received were derived from the business which he took from the defendant by means of the restraining order.

The plaintiff admitted at the trial before Your Honor that the gross sales from his business for a period of thirty-six months ran from \$250,000.00 to \$500,000.00. His methods of operation were approximately the same as those of the defendant. It is not contended that the goods used by the plaintiff cost more than those used by the defendant, or that his costs of doing business were any greater. We have, therefore, satisfactory data from which to determine the net profits of the plaintiff, upon a basis of a minimum of \$250,000.00. He testifies that out of the gross returns of \$105.00 per box to him, \$40.00 of the same repre-

sented profits, and if this be a true statement, and there is no reason to suppose that the plaintiff overstated [36] his gain, his average monthly sales would be \$6,944.00 and his average monthly net profits \$2645.00. These figures have assumed the minimum amount of merchandise claimed to have been sold by the plaintiff. Of course, the profits would increase with the volume of sales, and if they reached the plaintiff's maximum of \$500,000.00 the monthly profit would be \$5,290.00.

There is no testimony as to what proportion of these sums represent the profits which otherwise would have gone to the plaintiff. Inasmuch, however, as the Master has found that the plaintiff became trustee for the defendant the burden was cast upon plaintiff by competent testimony to separate those profits which were rightfully his from this which belonged to defendant. This the plaintiff has not done, and, upon the theory that the Master has adopted, any loss arising from this confusion of funds must fall upon the shoulders of the plaintiff.

Westinghouse Company vs. Wagner Company,
225 U. S. 604, 618.

Based upon the testimony of the defendant as to profits made during the time prior to the stoppage of his business by the Court's order and the admitted volume of business and profits made by the plaintiff and the failure of the plaintiff to properly account for those which belonged to the defendant, the Master makes the following findings:

That there came into the possession of the plaintiff by reason of the wrongful restraining order profits belonging to defendant Harbaugh in the sum of \$1,500.00 per month, and that the total amount thereof during the pendency of the injunction and from the 27th of March, 1919, to the 1st of January, 1920, at which date defendant ceased to do business, being nine months and three days, is \$13,650.00, and that defendant is entitled to recover that amount with interest from date of final decree against the plaintiff.

The Master prays that his compensation in the premises may be fixed and that due order be made for its payment.

Respectfully submitted,

ROBT. F. MAGUIRE,
Master in Chancery. [37]

(Title.)

Plaintiff's Exceptions to Master's Report.

Now comes Jos. F. Dwyer, the plaintiff in the above-entitled cause, and excepts to the report of Robert F. Maguire, the Master in Chancery appointed by this Court, which report was returned to the Clerk's office of this court on the 5th day of June, 1922, and as and for his exceptions thereto, submits the following erroneous findings and rulings revealed therein:

1. That the finding of the Master that the defendant is entitled to recover damages for loss of

profits anticipated from the use of a gambling device, is contrary to law.

2. That the Master erred in not finding that no damages are allowed for loss of profits alleged to be due through the use of a gambling device.

3. That the finding of the Master that the defendant, Paul Harbaugh, is the real party in interest in this suit, is not sustained by the evidence given before him (see Transcript, pages 70, 106, 103, 150, 212, 267), and is contrary to law.

4. That the Master erred in not finding that the defendant Harbaugh was not the real party in interest and that he showed no financial loss to himself.

5. That the finding of the Master that there was no material violation of the restraining order by the defendant is contrary to the evidence given before him (see Transcript, pages 39, 135, 233).

6. That the Master erred in not finding that the defendant had violated the injunction and was therefore precluded from recovering any damages.

7. That the finding of the Master that there came into the possession of the plaintiff by reason of the wrongful restraining order, profits belonging to the defendant Harbaugh in the sum of \$1,500.00 per month, for a period of nine months and [38] three days between March 27th, 1919, and January 1st, 1920, is not sustained by the evidence given before him (see Transcript, pages 100, 196, 62, 190, 199), and is contrary to law.

8. That the Master erred in not finding that there was no tangible or satisfactory proof of loss

of estimated profits by reason of the mutilated, altered and inaccurate data presented by the defendants to prove this alleged loss of profits.

9. That the Master erred in not finding that the profits claimed by the defendant were so remote, contingent and speculative and so entirely dependent upon the exploitation of a gambling device contrary to law, as to bar the recovery of any alleged profits.

10. That the finding of the Master that the defendant is entitled to recover from the plaintiff the sum of \$13,650.00 with interest, is not sustained by the evidence, and is contrary to law.

11. That the master erred in not finding that the liability of the defendant in any event was limited to the amount of the bond, and that not further damages, interest or costs could be awarded against him.

12. That the Master erred in not finding that the defendant was not entitled to the assessment of any damages.

13. That the Master erred in not finding that the gambling device, being the principle cause of the Court's action in quashing the injunction, that no damages should be assessed against the plaintiff.

BARNETT H. GOLDSTEIN,
E. L. SKEEL,

Attorneys for Plaintiff.

Filed June 7, 1922.

(Title.)

Opinion on Exceptions to Master's Report.

The Memorandum Opinion by District Judge BEAN, Filed July 17, 1922, on Master's Report.

The case of Dwyer *versus* Holsman was submitted on exceptions to a Master's report. Dwyer commenced a suit in this Court against the [39] defendants to enjoin the infringement of a patent for a ticket distributing device for the sale of merchandise.

This device consisted of a box containing some three thousand tickets. Each ticket was sold—or the right to draw a ticket from this box was sold to a customer for five cents, and 2975 of these tickets so drawn represented merchandise consisting of a collar button of the value of about one-half cent. The other twenty-five tickets contained on the face of them notations that the person who was fortunate enough to draw one of them would get merchandise of much greater value, but the box was so arranged that the customer could not see beyond the particular ticket that was exposed. It is therefore, clearly, and is now conceded to be, a gambling device.

At the time the injunction was issued and at the trial that fact was not emphasized by either party to this litigation, because they were equally guilty of a violation of the law and therefore they were disposed, apparently, to keep that fact in the

background. It was developed on the trial, however, of the merits of this controversy, by some inquiries of the Court, that such was the character of the device.

The complaint was dismissed upon a hearing on the merits, and on two grounds: First, that the defendants' device was not an infringement of the plaintiff's patent, and the Court intimated in the opinion that in any event it appeared to be a gambling device and a court of equity would not grant a party relief under such circumstances.

The matter was then referred to a Standing Master to ascertain and determine the amount of damages the defendants had suffered by reason of a preliminary injunction that was issued at the commencement of the hearing, and after taking the testimony he reported that in his opinion the damages amount to \$13,000.00 and recommended that a judgment be entered against the plaintiff and [40] his bondsmen, or his bond, for the amount of money. To this report the plaintiff has filed numerous exceptions, but in my judgment it is unnecessary to consider but one.

It is clear and accepted that a court of equity will not interpose to protect a party who is engaged in violating the law by operating a gambling device, and that is what this is, strictly, nothing but a gambling device. Now, the Master concedes that in his opinion, but he concludes that because it appeared that the plaintiff and defendant had a practical monopoly of this business and the plaintiff was permitted by reason of the injunction to continue

the business, that the profits, or a portion of the profits made by him during such time belonged to the defendant because the plaintiff became a trustee therefor *ex maleficio*, but in my judgment the vice of this position lies in the fact that this is in effect a proceeding to recover profits that the defendant would have made, or claims he would have made, if he had been permitted to operate a gambling device and violate the laws of the country. It is true under some authorities, where parties have entered into an illegal transaction and it has been consummated, and one has profits growing out of it belonging to the other, that the court will interfere to compel the party holding the profits to account to his partner, but that is not this case, as I take it, so that, without further comment, the conclusion of the Court is that the report of the Master should be set aside and the defendant denied any profits or any recovery because of this illegal injunction. He was prevented by the injunction, in effect, from violating the law of the country, and he claims now that he is damaged in a very large sum of money by reason of that fact.

Filed July 17, 1922.

(Title.)

Decree Setting Aside Master's Report and Disallowing Petition for Damages.

The Decree Entered July 17, 1922, Setting Aside the Master's Report and Disallowing Defendant's Petition for Damages.

This cause coming on for hearing upon the defendant's petition filed herein on January 17, 1921, for the allowance of [41] damages alleged to have been sustained by the defendants by reason of the issuance of the temporary injunction allowed herein; and,

It appearing to the satisfaction of the Court that a decree was entered herein on January 17, 1921, that the temporary injunction issued in this cause on March 27, 1919, be disallowed and referring the matter to the Standing Master of this Court to ascertain what, if any, damages were sustained by the defendants by reason of the issuance of the said temporary injunction; and,

It appearing to the satisfaction of the Court that the Standing Master has heretofore filed his report in connection therewith and exceptions thereto having been made and filed, and the said report having been duly considered by me after hearing the arguments of counsel, and having duly read and considered their briefs filed herein, and after having taken the matter under advisement and now being fully advised in the premises, the Court finds that no damages should be allowed to any

of the defendants herein by reason of the issuance of said temporary injunction; and,

IT IS HEREBY ORDERED AND DECREED that the Master's report be and the same is hereby set aside, vacated and held for naught, and that the defendants' petition for damages be and the same is hereby denied; and,

IT IS HEREBY FURTHER ORDERED AND DECREED that the petition of the plaintiff for the return of the Ten Thousand (\$10,000.00) Dollars in Liberty Bonds, deposited in this suit with the Clerk of this court, be granted, and that the same be returned to him, unless defendant shall within thirty days, perfect an appeal, with an approved bond in the sum of \$2500.00.

IT IS HEREBY FURTHER ORDERED that the fees of the Master in Chancery, be fixed at \$300.00 and that the same be paid jointly by the parties hereto.

R. S. BEAN,
Judge.

Portland, Oregon, July 17, 1922. [42]

And thereupon there was duly filed and entered in said court and cause

(Title.)

Petition on Appeal.

The Petition on Appeal by Defendant Paul C. Harbaugh.

The above-named defendant, Paul Harbaugh,

conceiving himself aggrieved by the decree in the above-entitled cause, entered July 17, 1922, vacating the report of the Master awarding damages to said defendant for the wrongful injunction issued herein March 27, 1919, and deciding that no damages should be allowed to any of the defendants herein by reason of the issuance of said wrongful temporary injunction,—

Therefore, this defendant does hereby appeal from decree and each and every part thereof for the reason set forth in the assignment of errors filed herewith, to this United States *Circuit of Appeals* for the Ninth Circuit, and prays that this appeal may be allowed and that a transcript of the proceedings of the District Court upon which said decree is based may be sent, duly authenticated, to said Court of Appeals.

Dated: Aug. 11, 1922.

PAUL C. HARBAUGH,
Defendant.

T. J. GEISLER,
Of Counsel for Defendant.

(Title.)

Order Allowing Appeal.

Order of Allowance Thereof.

The appeal above prayed for is hereby allowed.

And it is further ordered that upon said defendant giving a bond on his said appeal in the penalty of Twenty-five Hundred Dollars (\$2500) approved by

this Court, that the Ten Thousand Dollars (\$10,000) in Liberty Bonds deposited in this suit with the Clerk of this Court by the plaintiff as security for and in compliance with the condition of said temporary injunction, be retained with the Clerk of this Court pending this appeal and further order of this Court.

Dated: Aug. 12, 1922.

CHAS. E. WOLVERTON,
District Judge. [43]

Filed: Aug. 12, 1922.

(Title.)

Assignment of Errors.

There was further duly filed with said petition on appeal the assignment of errors.

Now, on this 11th day of August, 1922, comes the above-named defendant, Paul Harbaugh, by his solicitor and counsel, T. J. Geisler, and says the decree entered in the above-entitled cause on the 17th day of July, 1922, is erroneous and unjust to defendant:

1.

Because the District Court justified the illicit use by the plaintiff of the writ of injunction of this court to suppress the competitive business of defendant, on the ground that such business was illegal, notwithstanding the plaintiff was engaged in the same business as a competitor of defendant,

and profited directly by so suppressing the latter's competition.

2.

Because said decree is contrary to the principles of law, justice and equity governing the premises, and is particularly in violation of the principles which guarantees equal protection of the law to all persons, in that the District Court first interfered in the competitive business of the parties, and wrongfully enjoined said defendant from using his property in his business, thereby changing his position and condition in the premises, and enabling the plaintiff, by the illicit use of the process of this court, to make and take gains and profits from said defendant's business; and then the District Court abandoned defendant, and refused to require the plaintiff to comply with the conditions on which he obtained said illegal injunction, refusing to require him to restore to said defendant the gains and profits which he had so illegally taken from him.

3.

Because said decree is contrary to the principles of equity and justice, in that it permitted the plaintiff to profit by his own wrong in the premises, namely, to retain the gains and profits he made [44] by illegally enjoining the defendant, his competitor, and thereby unlawfully diverting and appropriating the business, and profits of defendant's business to himself.

4.

Because said decree is contrary to equity, and is

unjust to defendant, in that it disregards, and fails to give effect to, the condition which was the price at which plaintiff obtained and accepted the temporary injunction granted him in this cause, and later found to be illegal, and refused to require the plaintiff to make restitution to defendant of that which he illegally took from him by said illegal injunction.

5.

Because said decree is contrary to the principles of equity and justice, in that the District Court, tho still retaining control of the subject matter and the parties of this cause, refused to correct that which it had wrongfully caused to be done therein by its wrongful injunction, and refused to require the plaintiff to restore to said defendant the gains and profits which the plaintiff took from defendant's business, by illegally enjoining him.

6.

Because the District Court erred in decreeing that no damages should be allowed said defendant for the injury he sustained by the wrongful injunction obtained by the plaintiff herein, notwithstanding the finding by the Master that the plaintiff illegally took gains and profits from defendant's business under said illegal injunction and in equity now holds such gains and profits as trustee *male-ficio* for defendants.

7.

Because the District Court erred in sustaining the plaintiff's exception to the Master's report, also in setting aside and vacating said report and

refusing to allow to defendant any damages notwithstanding the facts as found in this cause.
[45]

WHEREFORE said defendant prays that the said decree be reversed and that the District Court be instructed to enter such decree herein as the Court of Appeals shall deem just and meet.

T. J. GEISLER,

Solicitor and of Counsel for Defendants.

Filed August 12, 1922.

(Title.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Paul Harbaugh, one of the above-named defendants, appellants, and Isadore Holsman, and Harry H. Holsman, both of Portland, Oregon, sureties, are held and firmly bound unto the above-named plaintiff in the sum of Twenty-five Hundred Dollars (\$2500) to be paid to the plaintiff, or his legal representatives, and for the payment of which we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of August, 1922.

WHEREAS the above-named Paul Harbaugh has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered in the above-entitled cause July 17, 1922, and desire that the Liberty Bonds deposited as

security by the above-named plaintiff be retained in the custody of this court:

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Paul Harbaugh shall prosecute said appeal to effect and answer all damages and costs awarded against him if he fail to sustain this appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

PAUL C. HARBAUGH, (Seal)
Defendant, Appellant,
Principal.

I. HOLSMAN. (Seal)

HARRY H. HOLZMAN. (Seal)

Signed, sealed and delivered in the presence of:

W. E. RAMSEY.

ARTHUR HEDEEN. [46]

United States of America,
District of Oregon,—ss.

We, Isador Holsman and Harry H. Holsman, the sureties, named in the foregoing bond, being severally duly sworn, depose and say that each of us is a resident and a freeholder within said District, and that each of us is worth in property situated therein the sum of Twenty-five Hundred Dollars (\$2500) over and above all just debts and liabilities and exclusive of property exempt from execution.

I. HOLSMAN.

HARRY H. HOLZMAN.

Subscribed and sworn to before me this 11th day of August, 1922.

[L. S.]

ARTHUR HEDEEN,

Notary Public for Oregon.

My commission expires Nov. 12, 1924.

I hereby approve of this bond August 12, 1922.

CHAS. E. WOLVERTON,

District Judge.

Filed August 12, 1922.

(Title.)

Citation on Appeal (Copy).

And thereupon, to wit, on the 12th day of August, 1922, there was duly issued the citation on said appeal:

United States of America,

District of Oregon,—ss.

To Joseph F. Dwyer, Plaintiff, GREETING:

WHEREAS, Paul Harbaugh, one of the above-named defendants, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law.

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why

the said decree [47] should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Portland, in said district, this 17th day of August, 1922.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on the 9th day of September, 1922, there was duly entered in said appeal in the United States Circuit Court of Appeals for the Ninth Circuit, the following:

(Title.)

Order Extending Time to and Including October 15, 1922, to File Record and Docket Cause.

On the application of T. J. Geisler, of counsel for defendant, Paul Harbaugh, it is ordered that the defendants be, and are hereby allowed to and including the 15th day of October, 1922, in which to file a transcript of the record herein, with the United States Circuit Court of Appeals of the Ninth Circuit.

Dated the 9th day of Sept., 1922.

WM. B. GILBERT,
Circuit Judge.

And afterwards, to wit, on the 13th day of Oct., 1922, a further order was duly entered in said cause, extending time for filing transcript of record on appeal.

(Title.)

Stipulation and Order Extending Time to and Including November 15, 1922, to File Record and Docket Cause.

It is hereby stipulated that the defendant's time to file a transcript of record herein with the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including the 15th day of November, 1922.

Dated: October 13, 1922.

ROBERTS & SKEEL,

FRANK A. STEEL,

Attorneys for Plaintiff.

T. J. GEISLER,

Attorney for Defendants.

On the foregoing stipulation, it is, on application of [48] T. J. Geisler, of counsel for defendant Paul Harbaugh,—

ORDERED that the defendants be, and are hereby allowed to and including the 15th day of November, 1922, in which to file a transcript of the record herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 13, 1922.

R. S. BEAN,

Judge. [49]

On September 30, 1922, there was filed a praecipe for transcript of record:

(Title.)

Praecipe for Transcript of Record.

To the Clerk of the Above-named Court:

In making up the transcript of appeal now pending in this cause to the United States Circuit Court of Appeals, for the Ninth Circuit, please incorporate the following portions of the record:

1, The bill of complaint; 2, order dated March 27, 1919, granting plaintiff temporary injunction; 3, statement that the plaintiff deposited the United States Liberty Bonds called for by said order with the Clerk; 4, the answer; 5, a statement that the defendants filed a supplemental answer setting forth the granting of letters patent of the United States No. 1,339,823, on May 11, 1920, to the defendant, Paul C. Harbaugh, for Ticket Dispensing Device on an application filed in the United States Patent Office Feb. 13, 1919; 6, the opinion of the Honorable R. S. Bean, District Judge, filed December 13, 1920, dismissing the suit; 7, the decree entered December 20, 1920, dismissing the suit; 8, the petition, dated Jan. 14, 1921, filed by defendant Paul Harbaugh, for correction of said decree; 9, the petition of the defendants, dated Jan. 15, 1921, for determining damages sustained by defendants by the wrongful temporary injunction; 10, the order of January 17, 1921, correcting said decree, entered herein December 20, 1920; 11, statement

that an appeal was duly taken by the plaintiff from said decree herein entered December 20, 1920, and Jan. 17, 1921; 12, a statement that said appeal was dismissed, the appellant failing to print the record in compliance with Rule 23 of the said United States Circuit Court of Appeals; 13, the report of the Master on the reference to him as to damages sustained by defendants; 14, a statement that the plaintiff duly excepted to said Master's report; 15, the memorandum opinion by District Judge Bean, filed July 17, 1922; 16, the order entered July 18, 1922, [50] setting aside the Master's report, and disallowing defendant's petition for damages; 17, the petition on appeal by defendant, Paul C. Harbaugh; 18, the assignments of errors; 19, the bond on appeal; 20, the citation on appeal; 21, the condensed statement of the evidence, together with the approval thereof by the District Court; and 22, the praecipe designating the portions of the record to be incorporated into the transcript on said appeal.

And please note that the title shall not be printed in full, but merely the word "Title" printed, together with the designation of the paper; and the verification of the pleading shall not be printed in full, but merely the words "Duly Verified."

Furthermore, in making up the return to the said Circuit Court of Appeals please send all the original exhibits used in the District Court, both on the trial of the injunction suit and before the Master.

Dated: Portland, Oregon, Sept. 21, 1922.

T. J. GEISLER,
Attorney for Defendant Harbaugh. [51]

On Nov. 6, 1922, there was filed a stipulation amending praecipe:

(Title.)

Stipulation Amending Praecipe for Transcript.

It is hereby stipulated that the praecipe lodged by the defendant on appeal in the above-entitled cause be amended so as to include a full copy of the order dated March 27, 1919, granting plaintiff a temporary injunction, and also a full copy of the plaintiff's exceptions to the Master's report.

Dated: Nov. 2, 1922.

E. T. SKEEL,
ROBERTS & SKEEL,
Attorneys for Plaintiff.
T. J. GEISLER,
Attorney for Defendants. [52]

On November 6, 1922, there was filed a statement of the evidence:

(Title.)

Statement of Evidence.

A Condensed Statement of All Parts of the Testimony Given in This Cause Essential to the Decision of the Questions Presented by This Appeal.

On the trial of this case by the District Court, to wit, October, 1919:

Testimony of Joseph F. Dwyer, on His Own Behalf.

JOSEPH F. DWYER, the plaintiff, being duly sworn, testified on his own behalf as follows:

We first began to manufacture these boxes (referring to Plaintiff's Exhibit 3) in 1917. I applied for a patent in January, 1918. My desire at the time of this invention was to produce a machine by which merchandise would practically sell itself. On these rolls of tickets the purchaser could always see what the merchandise would consist of which was sold for five cents. A great many of the tickets sold collar buttons and on various tickets throughout the rolls the offer was of larger value. I started to sell them in the fall of 1917 and they were very successful. "I have up to now sold thousands of them. I would say I have done a business—while I have not referred to my books on it—of between two hundred and fifty thousand and five hundred thousand dollars." Sales were made in Oregon—this represents the value of the merchandise sold through those Silent Salesmen. Those sales were Oregon, California, Washington, Idaho, Montana and Alaska; were sold pretty generally throughout those states. My customers here in Portland had considerable trouble. This was the one point [53] we were not able to do a great deal of business, because after we got started, they got placed among the trade here, first came

(Testimony of Joseph F. Dwyer.)

Enloe, and his partner in this business located in the Phoenix Building, the same building that the defendants are located in, also the same floor, the fifth floor, and, as I was advised, they began business in the same premises formerly occupied by the defendant in the suit that I had brought prior against Enloe; and my customers here were interfered with through this imitating device, not alone imitating the device itself, but imitating the method of sales, and the style of merchandise that was used, and in many cases was put out by the retail dealer as the same thing that he had had before, the difference being the price, the cut price given him by the defendants in this case, the General Novelty Company. Outside of this territory, we have had scarcely any trouble with infringements. In the operation of it the purchaser reads on the ticket "collar button five cents when sold by the Silent Salesman." This ticket he buys; it brings into view a following offer or a following transaction.

Cross-examination.

I applied for my patent through Frank Warren, an attorney in Seattle. He advised me that the art relating to ticket vending machines was pretty well covered. I knew that it was an old idea to put tickets in the form of a roll or package and feed them through slots.

(The file-wrapper of the Patent Office of plaintiff's patent admitted in evidence as Defendant's Exhibit "A.")

(Testimony of Joseph F. Dwyer.)

I read the Patent Office letter of March 27th, 1918, and particularly the paragraph beginning with the word "Springsteen," August 29, 1899," reading: "No. 632,070, 211/37, which shows finger holds to enable the operator to grasp the tickets. Wash shows tensioning device No. 25; Whitaker et al., June 11, 1872, No. 127,722, shows a pivoted dog L for preventing strip being [54] pushed back into the receptacle."

My device was used for the sale of collar buttons. Each ticket had on it that the purchaser was entitled to one collar button. That was all that he would get for a nickel on that sale. The collar button was an ordinary five cent collar button—gold plate.

Q. Will you tell me the intrinsic value, the value to the trade of the collar button which you sold for a nickel? A. I can't tell you that.

Mr. SKEEL.—I object to that, even though the witness might be disposed to answer. The value of the collar button hasn't anything to do with this case at all.

COURT.—I don't see what that has to do with infringement of patent.

Mr. GEISLER.—I just wished to bring out all the facts connected with the case, and the purpose and use of this machine.

COURT.—I don't think the value of the merchandise has anything to do with the question of the validity of the patent or the infringement.

(Testimony of Joseph F. Dwyer.)

Mr. GEISLER.—I agree with your Honor on that.

Q. I would like to ask this question, if the Court wishes to be advised on it; if it is not a fact that the object of these devices was to introduce into the sale to the customer the chance of getting something more than the collar button?

Mr. SKEEL.—I object to that as being incompetent and immaterial. The question is, what was the device used by the defendant, and what the device covered by the patent. That is the only question in this case, the question of apparatus.

COURT.—I think the objection is well taken. I don't see how it is material. [55]

Testimony of Henry L. Reynolds, for Plaintiff.

HENRY L. REYNOLDS, being duly sworn, testified for plaintiff as follows:

I reside at Seattle, Washington. I am a patent attorney and expert. I am not an attorney at law, but a mechanical engineer by education, and have taken up the practice of patent solicitation, patent attorney in that sense. My practice is entirely confined to the patent office and as an expert in patent litigation. Graduated as a mechanical engineer from the University of Illinois, and then practiced as a draftsman designer for a year and a half or more before entering the patent office under the civil service examination as an examiner. I was an Examiner in the Patent Office between two and a half and three years. As an examiner in the patent

(Testimony of Henry L. Reynolds.)

office making examinations of applications filed and passing upon them, determining the question of patentability, whether to allow or reject certain claims. Since leaving the Patent Office I have been practicing practically all the time as a patent attorney in Seattle and New York City. I have examined U. S. Patent No. 1,268,222 issued to Joseph F. Dwyer. Also the patents referred to by the defendant in his answer, being all the patents which were cited during the prosecution of the Dwyer patent.

Figure 1 of the drawings in the Dwyer patent shows the perspective of the device, giving its appearance as seen from the outside. Figure 2 shows a cross-section of the box, shows that the inside of the box is a roll which roll may be duplicated as many times as desired. This box is shown as containing five rolls. All of these rolls being mounted upon a shaft. The rolls of tickets are withdrawn. The end of the ticket is withdrawn from the roll passing over a bar under a holding dog, which is pivoted, and thence outward through a slot into the side of the casing into a guide chute which is formed beneath the glass covering plate and into which an individual ticket chute is formed for each ticket strip. The chute upon which the ticket rolls are mounted is supported by [56] the end walls of the box. In order to keep the various ticket rolls separated and to hold them in position relative to the discharge chute, partitions are inserted between the rolls. The holding dog is held down on the ticket at the point where it passes over the guide bar.

(Testimony of Henry L. Reynolds.)

The position of this dog and its shape is such that it offers no material resistance to the outward pull of the ticket but engages the ticket and holds it well enough to prevent the backward movement of the tickets. This is due to the fact that the ticket strip itself is somewhat flimsy and is impossible to exert any material force upon this by pushing. The character of the chute through which the tickets are discharged, which chute, I believe, is referred to as the guideway. The covered plate of glass bears upon the top of the slight ridges which occur between the consecutive chutes and thus support the plate so as to provide a chute to be slightly larger than the tickets themselves. With this construction, it is an easy matter to withdraw the tickets but impossible to push them back into the case. The purpose of providing such means is to prevent the possibility of withdrawing and inspecting the tickets and then pushing them back and refusing to take them.

What I consider to be the substance and the essence of the invention is the purpose to provide a machine which may be used for conveniently handling a mass of tickets so that they may be withdrawn one at a time and to do that in such a manner that it will be practically impossible, if not entirely so, to withdraw the tickets and then reinsert them in the box. The means which carry out that purpose are that the rolls and its mounting is simply a convenient manner of storing tickets for the convenience in holding and for withdrawing as desired. The guide consists of a bar which forms a con-

(Testimony of Henry L. Reynolds.)

venient support for the ticket so that it may be engaged directly upon this or closely adjacent to it by a dog or other holding member so that the ticket may be easily withdrawn but cannot be pushed back. The guideway or chute through which [57] the ticket passes after leaving this bar is a convenient means for displaying the outer ticket of each set so that the purchaser can see before purchasing, and can get a hold of it for withdrawal. The most characteristic feature of that lies in the mechanisms which are closely associated with the dog and the ticket supporting guide.

In my judgement, a ticket pack, by which I mean a strip of tickets, which has been folded back and forth in what is sometimes called an accordion fold or pleat, is in every sense substantially equivalent to the roll. The roll is simply one convenient means for putting up the tickets. The ticket pack is another and equivalent one.

I consider that attaching the partitions to a removable back which slides out, or to a back which hinges, or securing them in some other way independent to the back, is substantially equivalent. Their sole purpose and function is to form a partition or division between the rolls so that the rolls will not act upon each other and spread and get tangled, we might say.

“Question. Now, I wish you would take Plaintiff's Exhibit 2, purporting to be the defendant's device in this case, and I will ask you to compare that device, first with the device of the plaintiff, Plain-

(Testimony of Henry L. Reynolds.)

tiff's Exhibit 3, and then with the patent, and with each claim, and each element of each claim."

"Answer. Commencing first with the ticket as it is stored; in plaintiff's device, the ticket is rolled in defendant's device, he has employed what I term a ticket pack, that is, the tickets are in strips; instead of being rolled are folded upon each other. In the defendant's device, a method of storing tickets has been used which in appearance is different. I say advisedly, 'in appearance,' because I consider it an essential equivalent. The ticket, instead of being rolled, is folded back and forth upon itself so as to make what I have termed a ticket pack; that is, the tickets are folded and packed down together so that they [58] will fit in a box; he has not employed a shaft, because a shaft is manifestly inappropriate in connection with the use of the ticket fold. The tickets are drawn out from the box in that way (illustrating). Now, as for partitions separating the rolls, I find in the defendant's device a substantial and close equivalent of the partitions used in the plaintiff's device. The box itself with its sides forms the partitions to keep the various packs separated, and if the device is turned up through ninety degrees we would then have partitions which were secured to a removable back, namely, what would be ordinarily referred to as the bottom of the box. They are secured to a removable back so that they can be drawn out together, and they serve to separate the stored tickets. The tickets then drawn from the pack, are drawn under

(Testimony of Henry L. Reynolds.)

the spring dog which presses the tickets down under a cross-bar. The cross-bar in the device is shown as located just inward from the inner end of the guideway or chute through which the tickets are projected. The purpose of this spring dog is to prevent backward movement of the tickets so as to prevent first withdrawing and then return of the tickets. In this device defendants have employed one member having the combined function of the spring and dog shown in plaintiff's device, but this union of two members of this type which necessarily coact upon each other, and neither of which would be used without the other, as is the case in plaintiff's device, is obviously an equivalent. The tickets after leaving this spring dog enter the guide chute. This part of the device is formed in a manner which is almost, if not completely identical, with the formation of the device in plaintiff's machine. The under side of the chute is cut away so as to make it possible to get the finger underneath the ticket in order to engage it or pull it out. Between the chutes is a partition which functions as the rib of the Dwyer patent drawing. The chute is covered by a glass plate which rests upon these ribs or partitions. The results secured in the one case are [59] the same as in the other, and the means for securing it are also the same. The result so far as inability to push the tickets back into the box, is the same one place or the other.

Considering Claim 1: "A device for dispensing

(Testimony of Henry L. Reynolds.)

tickets from a ticket roll," That is a simple statement as to what the device is intended for, and, as I have said before, I consider the ticket pack as used in the defendant's device, a full equivalent of the ticket roll of the plaintiff's device, and the term, under any reasonable doctrine of equivalents, would apply to it. "Comprising a receptacle," that receptacle is the outside casing box which is found in both. "Having grooves through which the tickets may be withdrawn"; these grooves consist of the openings which have been made between the interior cavity of the box and the inner end of the ticket discharge chute, and in the prior patent; these do not appear to be given a reference number anywhere, except in figure 4 where they are lettered 14. "Said receptacle being provided in each end wall with slots that extend from the rear side thereof forwardly." Those slots are shown on the inner surface of the end wall and functioned purely as a support for the end of the shaft which is used by plaintiff. In the defendant's device there is a slot in the end wall which is used to secure the board which carries the feed dogs or rather the holding dogs. As defendant uses a ticket pack, he has dispensed with the shaft. This would follow from the use of the ticket pack and this is equivalent of the other, so I don't consider that that is a material difference. "Said shaft being adapted to be inserted in said slots," I believe I read, it applies to previous members. "A removable back wall for said receptacle and guide

(Testimony of Henry L. Reynolds.)

members fixedly secured to said removable back wall adapted to be inserted between the ticket rolls on said shaft to hold said ticket rolls in spaced apart relation," the device as now put out by plaintiff and as shown by the exhibit which I have here has the back wall hinged to swing down instead of to pull up, and the partitions are not fixedly [60] secured thereto. They are supported from and secured to, but removably secured to bottom instead of the back. In other words, the position of these parts has been changed by rotation through ninety degrees in effect. The corresponding member, as shown in the defendant's device, consists of the box, which contains the ticket pack; the sides of the box form the partitions between the adjacent packs and they are secured to the bottom of the box, which conforms to the back referred to in the claim of plaintiff. In this case, he has done just the same as plaintiff has in the exhibit, which is here, turned that part of the device to ninety degrees, so that the back to which these partitions are secured is at the bottom instead of vertical at the back. I consider the two constructions as being equivalent each to the other and as being equivalent to the terms of the patent claim. The claim further proceeds: "Said guide members having slots that fit over the shaft and co-operate with said slots in the end walls of said receptacle to form a support for said shaft." The defendant not using the roll, but its mechanical equivalent, a ticket pack, naturally has no need for the shaft, and of course he has no shaft which

(Testimony of Henry L. Reynolds.)

is supported or spanned by the partitions; that follows solely from the fact that he has adopted a ticket pack rather than a roll. Taking up claim 2, this reads as follows: "A ticket dispenser comprising a rectangular box-like receptacle"; that is found in both these devices and explanation of what it consists of is hardly necessary. "An inclined shelf formed on the front side of said receptacle and provided with ticket receiving grooves that are separated from each other by ribs and that communicate with the interior of said receptacle by means of slots formed at the end of said grooves." An inspection of each of these devices, plaintiff's and defendant's show that the element in its entirety, the ticket receiving grooves are there; they are separated from each other by ribs and they [61] communicate with the interior of said receptacle by means of slots formed at the end of said grooves, meaning, of course, the inner end of the grooves. The next element is: "A transparent plate adapted to rest on said ribs and cover said grooves whereby the tickets in said grooves will be visible." That is found in identical relation and condition in each of these devices. "A shaft supported transversely of said receptacle and adapted to have ticket rolls placed thereon." As I have explained before, the use of the ticket pack, which is the equivalent of the roll in the one case, makes the shaft something which may be dispensed with. This follows because of the equivalent construction used. "A removable side provided in said re-

(Testimony of Henry L. Reynolds.)

ceptacle.” Both parties have a removable side. This is essential in order to be able to obtain access to the interior for placing new rolls in and for other purposes. “Guide members carried by said removable side, and adapted to the inserting between said rolls to hold said rolls in spaced apart relation.” As I pointed out before, these partitions which are the guide members of plaintiff’s device referred to in the defendant’s device are represented by the box which holds the ticket pack; that is, the defendant’s device perform the identical function of these parts in plaintiff’s device. “A guide over which the tickets may pass from said roll in said grooves.” The guide in the plaintiff’s device is the small round bar, not a roll, because it does not revolve, but otherwise might be called a roll. In the defendant’s device, he has made this bar not of just the same round shape, but the tickets are drawn over this, and it functions in every way identically the same as the device of plaintiff. The question as to whether this is round or flat at the point where it is engaged by the spring dog is immaterial. It simply provides a table or resisting element there against which the spring may act to hold the ticket against return. The next element is “and tension devices engaging said tickets, the said tension [62] devices permitting said tickets to be withdrawn from said receptacle but preventing said tickets from being pushed back into said receptacle.” In other words, the meaning of that is tension devices which will produce the function stated

(Testimony of Henry L. Reynolds.)

there, namely, permit said tickets to be withdrawn but preventing them from being pushed back into the receptacle. This is done in plaintiff's device by a spring dog which has been made by using an ordinary spring wire paper clip. In defendant's device, this is represented by the flat springs. In the patent of plaintiff, this tension device is represented by a dog and spring acting upon it. In other words, in the device as shown here, these two parts as shown in the patent have been combined into one, without in any way changing their function or manner of operation, and this I believe to be a true and permissible equivalent. The function of this advice, the results secured by it are the same, both in the patent and in each of these boxes shown here."

"Question. Then to summarize, Mr. Reynolds, state to the Court whether or not you find in the defendant's device, Plaintiff's Exhibit 2, the elements of plaintiff's patent?"

"Answer. I do."

Cross-examination.

I have examined the Shoup, No. 286,493, Springsteen, 632,070 and Whitaker, 127,722, patents. All of the patents show a receptacle or container for the mechanism employed and an opening through which the tickets may be projected.

I have also seen and examined the patent of C. L. Davis on Ticket Case or Holder granted May 31, 1892, No. 476,005, and the patent to O. Oehring on Ticket holder granted December 6, 1910, No. 978,-

(Testimony of Henry L. Reynolds.)

052, both showing the *the* auxiliary between a roll and packs of tickets as existing at a date prior to the Dwyer patent.

Looking at defendant's device, the end walls of the [63] device are each provided with a slot but no shaft is inserted in that slot. Instead of the shaft we find a plate or bar, flat bar, which carries the spring dog, but there is no shaft in it. There would be no purpose in introducing into the side walls of the case slots to carry a shaft which does not exist. In the defendant's device there is not identically the same element in appearance and construction, as the ones defined by that part of the claim for plaintiff's device. The Dwyer patent specifically states that the partitions are fixed to the removable back wall. The defendant's device has no back wall which is fixedly fastened to the partitions, that is, the back wall I mean, a portion of the outer casing. That is possibly what is meant by "a removable [64] back wall" in claim 1 of the same patent. The next element in the same claim provides: "Guide members having slots that fit over said shaft and co-operate with said slots in the end walls of said receptacles to form a support for said shafts." That has reference merely to the little parts that are cut away in the partition walls of plaintiff's device, so as to adapt them to be inserted over the shaft which carries the rolls of paper. The defendant's device having no partitions, necessarily has no slots in partitions of this kind. The Whitaker patent of 1872, looking at Fig. 5, provides a tension de-

(Testimony of Henry L. Reynolds.)

vice of some kind which, in one position, will function to prevent the ribbon being drawn back. The Shoup patent 286,493 of 1883 has a glass plate covering the exposed part of the ribbon and looking at Fig 2, it also has a roll acting upon the ticket strip to prevent their turning backwards. [65]

In the patent granted to Mr. Dwyer there was contained a specific element in each claim a removable side referring to the back wall of the casing.

There is nothing in the Harbaugh box which is similar with regard to partitions as *as* the construction shown in the Dwyer patent. [66]

Testimony of Charles S. Goldberg, for Plaintiff.

CHARLES S. GOLDBERG, being duly sworn, testified for plaintiff as follows:

I live in Portland. I am an attorney at law and consulting engineer and specialize in patent practice and have been so engaged since 1917. I have had experience in mechanical engineering work for twenty-five years or more, and have been engaged in the study and interpretation and construction of patents. I have examined the patent at issue in this case, that is, Dwyer's patent, and have also examined the two devices here referred to. That is, plaintiff's device and defendant's device. This has been brought somewhat suddenly upon me but I think I am sufficiently familiar to express an opinion on it, as to whether the defendant's device contains the elements of the claims of the Dwyer

(Testimony of Charles S. Goldberg.)

patent and whether it is substantially the same as plaintiff's device. I will say that in the defendant's patent we have an outside case which supports the tickets and we have the opening through which the tickets are drawn by the buyer and as an essential element of this, I would regard a means of preventing such tickets from being returned to the receptacle from the box. This would be the essential characteristic, as far as I can see, of the defendant's patent. I should say that the elements of the claims of the Dwyer patent are contained in the defendant's device in their entirety. The functions of the partition in the plaintiff's device are simply to prevent the tickets from interfering with each other, in the process of pulling them out. They are merely as a guide in pulling the tickets out. I find the same functions performed in substantially the same way in defendant's device. By partition walls which are very similar to the partition walls in the plaintiff's device, except that the partition walls are in the shape of boxes which rest on the bottom of the device. As a patent expert, I will say that it is not material or essential, under the patent, for these partitions to be affixed to the rear. [67]

Cross-examination.

In the Harbaugh device there is no removable wall which had partitions affixed to it, and which is an element in the language of claim 1 of the Dwyer patent.

Testimony of Paul Harbaugh, in His Own Behalf.

PAUL HARBAUGH, defendant, being duly sworn, testified:

“Question. Did you sell any of that merchandise upon which you got a commission to or through Mr. Enloe, the defendant in the other case?

Answer. Yes, sir.

Question. Then you were acquainted with Mr. Enloe, that defendant?

Answer. Yes, sir.

Question. You sold for Mr. Holsman merchandise to Mr. Enloe, to be sold by means of his Silent Salesman, this device?

Answer. Sold him merchandise for whatever purpose he wished to use it.

Question. And you got this idea, Mr. Harbaugh, for using your device, whether it is the same as his or not, from the one—from having seen Mr. Enloe and the plaintiff in this case selling merchandise by means of this device, isn't that right?

Answer. Probably.

Question. Now, that is a fact isn't it? That you had never seen it before until you saw either the plaintiff or Enloe's, isn't that a fact?

Answer. Yes.

Question. Now, Mr. Harbaugh, you had sold for Mr. Holsman a considerable quantity of merchandise through Mr. Enloe, by means of his Silent Salesman, hadn't you? Answer. Yes.

Question. And when he was enjoined by the

(Testimony of Paul Harbaugh.)

Court, it cut off a considerable source of revenue for you, didn't it? Answer. Yes. [68]

Question. Then you took this device and started to see if you and Holsman couldn't work out something of it for yourself. Isn't that right?

Answer. Something of that nature, yes.

Question. Now, as far as new business was concerned after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced in evidence as Plaintiff's Exhibit 2, you built another kind of box, didn't you, with which you supplied all the business you have been able to get?

Answer. Yes.

Question. And as you said yesterday, you had never seen this device used or any selling of merchandise by a device of this kind until you saw the Dwyer and this Enloe device?

Answer. That is correct.

Question. And that is where you got your idea?

Answer. Yes, sir.

On certain of these tickets there is printed an order for merchandise of greater value than the ordinary ticket bears. The purchaser runs the chance of getting a bonus on a given ticket. The object of not having it go back into the machine is that a purchaser might try to look two or three tickets ahead and see [69] whether he is going to draw a bonus on his next. There is a valuable piece of merchandise given with every ticket. The pur-

(Testimony of Paul Harbaugh.)

chaser knows when he buys a ticket exactly what he is getting, but he does not know what he will get the next time. Each transaction is technically complete in itself and actually there is a matter of chance connected with it, the chance to pull the next ticket if he desires.

COURT.—The purchaser of all tickets receive the same quantity of merchandise?

Answer. No, sir; some receive articles of greater value than others.

COURT.—There is, then, a question of chance.

Answer. Well, that is a rather involved question.

COURT.—I mean as a matter of fact.

Answer. As a matter of fact, there is, yes.

COURT.—There is more or less of—well, we might say, perhaps not accurately, but for the purposes of this case, more or less of a lottery connected with it?

Answer. Yes, it is actually a substitute for the punchboard, which you have seen, probably.

COURT.—The purpose of the mechanism that prevents the pushing back of the ticket is to prevent the customer from knowing what is on the ticket?

Answer. Yes, following.

COURT.—That he doesn't get?

Answer. Yes, sir."

COURT.—If the ticket exposed for instance shows a five cent ticket and a collar button he would get a collar button if he pays the five cents?

(Testimony of Paul Harbaugh.)

Answer. He knows he gets the collar button, and a chance to pull the next ticket if he desires.

COURT.—But if the next ticket shows a collar button and [70] a camera or some other merchandise he would then have a chance to get the next ticket for five cents and get the merchandise?

A. Yes, sir.

COURT.—And that is simply continued as long as he is willing to buy a ticket? A. Yes, sir.

Mr. SKEEL.—I simply wish to say this on that question: that this device has been held not to be lottery or gambling device of any kind, if that is the question in the Court's mind.

COURT.—It occurs to me now that inasmuch as it has that feature whether it is such a character that a court of equity would care to enjoin someone infringing it.

I have authorities on that subject. I would also like to say that this apparatus itself has been specifically held by the court not to be a lottery or gambling device.

**Testimony Taken Before Robert F. Maguire,
Master in Chancery.**

Testimony Taken Before ROBERT F. MAGUIRE,
Master in Chancery, February 2, 1922, Under
the Order of Reference.

The plaintiff was present in person and represented by his counsel, Barnett Goldstein, Esq., and the defendant Paul C. Harbaugh was present and represented by his counsel, T. J. Geisler, Esq. [71]

(Testimony of Paul C. Harbaugh.)

The following stipulation was dictated by counsel and agreed to by the parties present:

IT IS HEREBY STIPULATED by and between counsel for the respective parties hereto that the defendants at this time will not urge and do now abandon that part of the petition for damages which seeks to recover the sum of two thousand dollars for deterioration of merchandise and the sum of five hundred dollars for attorney's fees.

Testimony of Paul C. Harbaugh, in His Own Behalf.

PAUL C. HARBAUGH, was sworn as a witness and testified on direct examination:

I am twenty-eight years old. I reside in Portland, Oregon, and am in retail jewelry business. In the early part of 1919 I operated the General Novelty Company. I was the owner; merely assumed that name. I was engaged in the business of selling merchandise in which I used the box Plaintiff's Exhibit Number Two.

An assortment of merchandise accompanied the box and some of it was in the box, and there was a ticket which designated the item of merchandise bought. The tickets were purchased and presented to the dealer or his clerk and the item of merchandise claimed.

I made two hundred of these boxes. The merchandise sold by these boxes consisted of quite a large assortment, for the most part mounted on a pad, something on this order. (Hands picture to counsel.) Attached to this picture is a list show-

(Testimony of Paul C. Harbaugh.)

ing the articles in that assortment. The three pictures attached together as one exhibit marked Defendant's Exhibit 1.

There will be no claim of damages on behalf of any of the other defendants because Mr. Harbaugh is the only one injured by the injunction.

There was an assortment of the merchandise delivered with each box. The assortment and the tickets in the box corresponded with each other. I made the selection of articles for the assortment. [72] The value of the assortment varied between thirty and fifty dollars. The box cost \$2.50. I sold the assortment of merchandise to the dealer for \$150, less thirty per cent commission usually. These assortments were placed on consignment with the dealers and he was allowed thirty per cent for such sales as he made. In placing these boxes with the dealers the salesmen called on them and either placed them in person, or took orders to be shipped. The names of my salesmen were Paul Enloe, Sam Flatow, Ben Levin, L. Rubenstein, M. Schultz and Joseph Schnitzer and some others. Mr. Rubenstein, Mr. Levin, Mr. Enloe and Mr. Schultz did most of my work. All of them except Mr. Schultz lived in or about Portland. Mr. Schultz lives at Fort Dodge, Idaho, I believe.

We had what we called a salesman's record, kept on sheets, on which each assortment that we placed was entered. These are the sheets. They are in the handriting of Winnifred Sullivan. She was

(Testimony of Paul C. Harbaugh.)

my bookkeeper. Her name is now Mrs. Morris Minsky and lives in Seattle, Washington.

I instituted the system for keeping account of these transactions. The entries were made by the bookkeeper under my direction. By refreshing my memory from these record sheets I can testify as to each transaction I had with these boxes or merchandise. These record sheets relate to the year 1919.

Sheets received in evidence providing some connection is subsequently made of identifying the actual transactions, or illustrating the testimony of the witness.

The months of February and March as given on these entries refer to 1919. Some of the handwriting, the headings, are mine.

Mr. GOLDSTEIN.—I have got to object to the sheets being offered in evidence because they have not been properly identified by the party who made them.

What was done in your business, if you know of your own knowledge,—how were the entries posted in your books which you [73] kept, sheets or whatever they may have been?

As each assortment was shipped out, the entry was made on these record sheets, and also entered on a card. The entry on this sheet in most cases was made from the original order. I have such original orders here. They are all contained in these files.

The MASTER.—Mr. Harbaugh, have you taken

(Testimony of Paul C. Harbaugh.)

the original orders and checked them with each of the entries upon this record that you have been referring to? Yes.

The MASTER.—Are there any entries appearing upon these records for which you have not got the original orders in this file?

Yes. In some few cases I did not receive any signed order, simply a verbal order, or an order by letter which was not kept with this file or with the form orders. Then also these have all been in storage and all these records are badly mixed up and I feel pretty sure that some of them have been lost.

I have personal knowledge that every one of these entries of goods shipped were in fact made, and the goods put in the hands of these particular purchasers. I know that from my own personal knowledge and observation. These sheets are segregated by the salemmen's names. If an order was taken by Mr. Enloe, when it was shipped the entry was made upon his sheet, and the same with the other salesmen. The opposite side is a record of receipt of money from the dealer applying to these assortments. I know that the sums of money received and recorded here were received from these individual dealers whose names appear here.

There were other advances or expenses paid in connection with each of these items than appear under the column of advances and expenses.

Mr. GOLDSTEIN.—You are aiming practically to show the [74] entire record here?

(Testimony of Paul C. Harbaugh.)

Mr. GEISLER.—Yes.

Mr. GOLDSTEIN.—I would have to object to that as not competent to be used by this witness. He does not know anything about it of his own knowledge except what somebody told him.

Mr. GEISLER.—I am trying to make all the short cuts I can. Of course I can go through each transaction separately.

The MASTER.—For instance we have here the names of the dealers who purchased the goods and the names of the salesmen who took the orders and the money received. Do you know the goods were sent to the dealers named? Yes, I know that.

The MASTER.—For instance we have the names of dealers and places, and the salesmen who took the orders and the money received. Do you know the goods were sent to the dealers named?

Yes, I know that.

The MASTER.—For instance we have the names of dealers and places, and the salesmen's orders, and the entry of the money received; do you know that that money was received from that customer?

Yes, I know that.

The MASTER.—If he knows these matters I do not see how we can keep this out. I do not see why he could not testify from it.

Mr. GOLDSTEIN.—Do you mean to say you can now remember that you got the money set out alongside of the names as it appears here?

Yes.

(Testimony of Paul C. Harbaugh.)

Mr. GOLDSTEIN.—How can you remember that. I know we received the money.

Mr. GEISLER.—Under whose directions were these entries made? [75] Under mine.

Mr. GOLDSTEIN.—The only way he knows the money was received is because it appears on that sheet.

Mr. GEISLER.—He may have an independent memory also.

The MASTER.—Is there going to be an offer of this?

Mr. GEISLER.—I am going to offer it for the purpose of showing the number of boxes which were sent out to dealers during the period when the business was first started and ending with the time when the injunction prohibited him from doing further business.

Mr. GOLDSTEIN.—And I will object to the offer on the ground that the record has not been properly identified, in that it was not made by this witness, and furthermore, according to the testimony of the witness his knowledge of the transactions is dependent upon hearsay evidence and what appears in the record not made by him.

The objection was overruled and the sheets received and marked Defendant's Exhibit 2.

The expenses connected with the making of these sales outside of the commissions paid to the dealers; explained in detail were maintaining an office, salaries of bookkeeper and assistants who made up the

(Testimony of Paul C. Harbaugh.)

assortments, express charges, stationery and such items as that, and the commissions paid to the salesmen, which were 15% of the amount received. We kept a list of all moneys paid out for expenses and at the end of the month entered them in the journal.

When an assortment was shipped out a record was entered on the salesmen's commission sheets and also on a card which was placed on a card index. The salesmen's commission sheet is marked Defendant's Exhibit 2. These are the cards. These two entries were made approximately at the same time.

Cards marked Defendant's Exhibit 3. [76]

I got the information for making these entries on the commission record and on these cards, from the original order or memoranda of shipment. These original orders are in this box here.

The original orders in the box received as Defendant's Exhibit 4.

I know of my own knowledge as to most of these orders in this box marked Exhibit 4 being filled. I am able to tell which of those orders had been filled by looking at the salesmen's record. I know of my own knowledge that each one of these orders which is specified here on Defendant's Exhibit 2 was filled. There were cases where they were returned later without being used, but those returned were noted on the record by the explanation "Did not use," or "returned" or some such, written opposite to the particular name of the dealer and in alignment to the dealer's name.

(Testimony of Paul C. Harbaugh.)

I know the net profits that my business realized from the boxes put out prior to the date of the preliminary injunction approximately. I ascertain that amount by deducting from the receipts all expenses, which left the net profit. I have a record of the receipts, but the expenses have to be estimated, in a number of instances. The receipts were entered in the salesman's record sheets, also in the journal.

This journal was received in evidence as showing the receipts from these boxes and the merchandise sold, and marked Defendant's Exhibit 5.

The expenses consisted in a number of items. First, I estimated the cost of the merchandise that was sold at 50 per cent of the receipts as a maximum; it would actually be considerably less than that. Then there were commissions to salesmen. They are arrived at from the information on the salesmen's record sheets. When paid there would be an entry of the amount and to whom paid on the commission's record sheets. They were also entered in the journal at the end of the month; the total was entered in the [77] journal.

All other expenses were grouped. Rent and light and office expense, such as bookkeeper's salary and workmen's salaries, stationery and the like. Record was kept of them and the total entered in the journal at the end of the month. I have only the total for each month, so in arriving at the estimated expenses for the period of forty-five days I took seventy-five per cent of the total amount for the

(Testimony of Paul C. Harbaugh.)

two months, which gave me the approximate expense, as near as it could be arrived at for the forty-five days.

Ledger received in evidence and marked Defendant's Exhibit 6.

I will trace through the whole account of W. M. Crouch, Oakland, Oregon, so as to inform the Court of the mode in which I kept my accounts with respect to these sales, and how I arrived at the final net profit made.

An order was taken on February 25, by P. V. Enloe, the salesman. That order was shipped and entry made in the salesmen's record sheets showing the assortment number, and the address of the consignee. There was also an entry made on a card in the file. The order shows the kind of assortment of merchandise sent to that man by number, assortment No. 101. These assortments were identified by the salesman's card—we had standard assortments that were numbered and the salesmen carried a number of them and we also had a similar one in the office; when an order came in for an assortment No. 101 we made one up of the duplicate we had in the office and shipped it. We had a great number of these kind of assortments.

I had a record showing the actual cost to me of each assortment. There was only one class of assortment sold during this period, and in that particular we sold Assortment No. 101, of which I have a record here some place.

(Testimony of Paul C. Harbaugh.)

The picture there, showing that this assortment No. 101 [78] cost \$36.30 for the merchandise, which, however, did not take into account the collar buttons. Took in everything else. The collar buttons were always the same amount.

There were three thousand collar buttons to each assortment. These cost two dollars a thousand, thus six dollars for each assortment. In addition to the other specified items the real fact was that each assortment only used approximately five hundred collar buttons, because the customers didn't take them.

In figuring we cannot say how many less there were, so there will have to be added to \$36.30, six dollars for collar buttons. That would make the total cost \$42.30.

I made up the first assortment and then had the workmen copy it. I personally am acquainted with all prices of the goods and am able to testify positively at this time as to my own knowledge of these assortments within a limit of variation. In making up my estimates I placed the cost for each assortment at not over fifty dollars. The actual cost was less in each instance.

Testimony of Louis Rubenstein, for Defendant.

LOUIS RUBENSTEIN, a witness called on behalf of the defendant, being duly sworn, testified on direct examination.

I live in Portland, Oregon. Aged 43. My present business with the Goodyear Raincoat Company

(Testimony of Louis Rubenstein.)

in this city. I know Mr. Paul Harbaugh, yes sir. In the early part of 1919 he was with Mr. Holsman in the wholesale jewelry business, and punchboard.

Mr. Harbaugh carried on the punchboard business under the name General Novelty Company. I was connected with that General Novelty business as traveling salesman. During the early period of 1919; started in 1918, I believe I started in the fall of 1918 and left there about August, 1919. I was in the employ of Mr. Harbaugh during January and February and March of 1919. I know about his putting out boxes called Merchandise Vendors. I recognize this as such a box (referring to Plaintiff's Exhibit No. 2 in the District Court). [79]

In connection with that box I used to go on the road, taking orders for the punchboard—whatever it is called. It is a board with merchandise on it and I used to have to sell these orders and those were the boxes that were furnished with the orders.

When I made a sale the dealer to whom I made the sale used to sign the order that I would make out. The sale to the dealer was made on commission basis consigned to him. The original of that order which I took that way and which the dealer signed used to go into the house and I used to give the dealer a copy of it.

I could not say exactly the method in which the salesmen's accounts were kept by Mr. Harbaugh, but there used to be a system that I remember—when I came in off the road I would want to inquire into certain accounts, whether such accounts were

(Testimony of Louis Rubenstein.)

shipped, or whether they had run out and possibly re-ordered—there used to be a card list I remember the girl used to go to, that is the bookkeeper, Mrs. Minsky.

The MASTER.—Turn to Mr. Rubenstein's account if you want to.

Mr. HARBAUGH.—These are not listed under his name, they are under the head of the office, because he wasn't on a commission basis.

This is my territory right here. George W. Baker, Centralia, Washington. March 8, 1919. Clampitt Brothers, Chehalis, Washington. March 8, 1919. Fred Bleachwood, Aberdeen, Washington. March 10, 1919. Bleachwood, Aberdeen, Washington, on March 11, 1919. Ed Loff, Hoquiam, Washington. George Heath. This was on March first, Kennewick. Cross & Leonard, Montesano, Washington, on March 3. Carroll & Ford, Elma, Washington. The dates on the last ones, Cross is on March 3 and Carroll & Ford on March 13. Then there is J. B. Putman, Hoquiam, Washington, on March 13. Jack Nitkey, Harrison, Idaho, on March 14. Had a lot of trouble [80] with him, I remember him well. H. A. Kolb or Kalb; that is as near as I can get it; Raymond, Washington. The last two are on March 14. This is also March 14. A. Willis, Raymond, Washington. On March 15, Sklodo Brothers. At Cosmopolis, Washington. On the same date Morris & York, Kelso, Washington. March 15. On March 17, J. E. Steinberger, Toledo, Washington. L. J. Bright, Castle Rock, Washing-

(Testimony of Louis Rubenstein.)

ton, on March 17. On March 18 Peden & Miller, Garfield, Washington. Under March 19, Clampitt Brothers, Chehalis, Washington. There is one account I don't just remember the name, but that was in my territory, Colfax, Washington; C. A. Morley; either the name is changed here or I have lost track of the name. I don't remember that name. Charles Amos, Troy, Idaho; this is under March 25. March 29, Brown & Morrison, Yakima, Washington. March 29, Sharp & Turner, Lewiston, Idaho. Under the same date H. E. Kepler, Lewiston, Idaho. Under the same date Sprague & Long, Yakima, Washington. Under March 28, E. S. Mauk, Winchester, Idaho. George N. Heath, Kennewick, Washington; this is March 26. In each of these cases I got a signed order from the parties. In each case I delivered a full assortment of merchandise with the boxes; the latter like Plaintiff's Exhibit 2 in the District Court. I also refilled a great many orders. If the order wasn't quite finished, I would take a new order and take that back and allow whatever merchandise there was on there; or else let them run that out and in the meantime send a new one; and in many cases I have taken more than one order from the same firm. I might not get around in time before that order was gone; some of them used to do more business than others.

I collected in all cases as long as I was on the road. I continued to do business for Mr. Harbaugh, I believe, until July or August, 1919.

(Testimony of Louis Rubenstein.)

I remember about an injunction being served on Mr. Harbaugh. When I came in from the road they told me I was in [81] with the rest of them, that I would go to jail for the infringement of the box. I was a party defendant in that injunction suit. After this injunction had been issued I placed a large box, a round one, on the road. That is the very model of it. (Referring to Defendant's Exhibit No. 7, introduced without objection.)

This box here, the round box, was not received with the same favor as the original box by the dealers. There was objection to it for several reasons. The first objection was that it was large, it would take up too much space; usually kept these boxes on a showcase or cigar case or somewheres in the front where they could be seen, in order to get the customers interested in playing it, and when we put the other one on they complained it was too large and was taking up too much space. That is one of the main reasons; bunglesome. The placing of the new box to my knowledge affected the subsequent trade, after the injunction in this way, that they kept on telling why I didn't give them the old box, it was smaller sized box, less bulk. They could see all the numbers right in front of it. In lots of cases they would possibly pull on a certain number and after they had spent, say ten or fifteen tickets they would be pulling on, they would figure there must be a price about due. By turning this large box they would lose the number they had been pulling on and they would not know

(Testimony of Louis Rubenstein.)

whether that was the same one or not, and in that way it wasn't satisfactory. They claimed that the round box, Defendant's Exhibit 7, was used to mislead the customer.

The business began to fall off. The customers wanted the other box back again, and eventually they drifted back to either that one or one similar to that. This one here I recognize, I used to see this box here a great deal; the Bargain Box. (Referring to the plaintiff's box marked Plaintiff's Exhibit 3 in the District Court.)

They would replace our round box with those other boxes. [82] And in a great many cases they told me they liked my merchandise better, the board which the merchandise was displayed on, but they didn't like to keep the box, Defendant's Exhibit 7, on the show case.

Cross-examination.

That was the only reason business fell off, the use of this box; not because of police interference.

In some cases when I came into the office I was told that a certain party would not have another one of those outfits because of police interference. I came in contact with that objection right from the start when I began operating with the General Novelty in the Fall of 1918, in some places. In some places that continued right along.

"Well, when you came in didn't you tell them a certain party would not have another one of those outfits because of police interference?"

Answer. In some cases.

(Testimony of Louis Rubenstein.)

Question. Well, did anybody refuse to take any because of police interference?

Answer. Well, not very much.

Question. Well, did any?

Answer. Well—

Question. Say yes or no.

Answer. Yes.

One case I remember Castle Rock. It seems to me in Pendleton, Oregon, there was one case. I think I remember one case in Raymond, Washington. No, I remember Raymond didn't have them; when I started they didn't have them, the merchants were afraid to have them, on account of police interference. On the second trip I was there each merchant had all the way from one to three different novelty boxes from different firms. That is the [83] case of Raymond. I remember Raymond, I remember I had a little trouble the first time I was there, they would not handle them. The first time I was there would be in the early spring 1919. The next time I found them there was maybe thirty days later. I placed orders there then. I sold quite a few there until I believe that the police stopped them again.

I could not tell at any time when the police would step in and interfere with the operation of these boxes; that was a chance I was always taking with my business in every town I went to in the State of Washington and in every town in the State of [84] Oregon. That was the chance I had of getting any business, whether or not the merchants

(Testimony of Louis Rubenstein.)

would care to risk the chance of police interference.

“Mr. GOLDSTEIN.—At this time I will ask that the defendant produce a letter from Fred Blackwood, Aberdeen, Washington, under date of July 9th, advising to the effect that the boards were stopped by local authorities. Also a letter from H. A. Kalb, Raymond, Washington, under date of July 1, 1919, advising that the city officials were looking into gambling devices.

Mr. HARBAUGH.—I cannot find any of the correspondence of that period, but I do remember some such letters being received, and if you can give me the cards I can refresh my memory by them, but I know several such letters were received at different times.

Mr. GOLDSTEIN.—I show you a card from L. L. Fisher, Kelso, Washington, upon which there appears a notice, “Rubenstein advised Kelso closed temporarily,” and ask you if that refreshes your recollection.

Answer. Possibly it does; I could not say, because, as I say, we had that right from the start, at all times. (Referring to police interference.)

I don't remember when it was that I first came back to Portland and found out that an injunction had been secured restraining us from operating with these boxes.

I think it was at least two or three weeks before the round box could be made up. We had a terrible time getting the shop to make those.

(Testimony of Louis Rubenstein.)

There appears on office sheets record marked Defendant's Exhibit 2 the following notation: Sale on March 29, to Brown and Morrison, Yakima; March 29, Sharp and Turner, Lewiston, Idaho; March 29, H. E. Kepler, Lewiston, Idaho; March 29, Sprague & Long, Yakima, Washington. I don't know whether I received any instructions on that trip or not in respect to securing back those boxes from those people. The method was to place these boxes on [85] consignment with the merchants, after the merchants disposed of the merchandise they would then secure additional merchandise or return the box.

The efforts that I made about calling in those boxes was whenever I was there I would take the box and pack it up and ship it back. I did that as soon as I was notified, when I went out with the new order; when that was I don't know. I was instructed to do that immediately upon my return from the road, after the injunction was issued, to call in any of the boxes that were outstanding.

I would not write letters to the General Novelty Company explaining why I could not do business with certain parties [86] because of police interference. I would not complain, I would go out and grind, if I could get them I would and if I didn't I didn't. There was nothing sure because of this police interference. That was so from the start and the police interference never stopped.

There are 3000 five-cent tickets in one of these boxes.

(Testimony of Louis Rubenstein.)

The merchants would not return any of the collar buttons they could not sell. We would not ask for them and we would not get them.

These merchants were told that after they sold all the three thousand tickets and disposed of and secured \$150.00 in that way, they could retain one-third as their commission, forty-five dollars, and all they were required to remit was \$105.00.

In a few instances the people to whom I sold these boxes and outfits could not sell their entire quota of tickets, or three thousand tickets and they would return us the balance of the merchandise on hand with the cash received.

The time required to make the sale would depend on the trade the merchant had, some places maybe would sell two a week, some places maybe one a week, and some places maybe one a month. One could not tell to a certainty how long it would take a man to dispose of his stock. It depended on how the town was moving, whether there was any work going on for these loggers or other people who attended these places, or whether the police let the matter be without interference.

The merchants with whom I ordinarily deposited these boxes were cigar-stores, candy-stores, soft-drink houses. A great many of them soft-drink houses and poolrooms; where there were boys hanging around. It depends upon the boys that hang around these places that spent the money.

These boys didn't expect to buy a collar button for a [87] nickel. They expected to get some-

(Testimony of Louis Rubenstein.)

thing big, a camera or something. That was the chance they were taking. A fellow would keep on pulling these tickets until he struck something big, before he quit.

When I made my second trip, in the event they had not disposed of the outfit I would take what cash they had secured, less the commission, and let the box stay there until they got rid of the merchandise. I took some home with me after the injunction was served. I don't know how many.

I was employed by the General Novelty Company. Mr. Harbaugh was the man in charge. I don't know who else was interested.

I first began to sell these boxes I think in January or February, 1919, for the General Novelty Company. I received Fifty dollars a week straight salary. I wanted commissions at that time, but the business was too good, they would not give me commission. I asked for commission when I started selling these boxes, referring to Plaintiff's Exhibit 2. I wanted to work on commission. I spoke to Mr. Harbaugh. I got fifty dollars a week, and that continued until I was fired by Mr. Harbaugh, about the latter part of July or the first part of August; I made arrangements with another concern and I went to work there the fifteenth of October.

When I was disposing of Defendant's Exhibit 7, selling those, I had the same assortment of merchandise with them as I had with Plaintiff's Exhibit No. 2 as I remember.

(Testimony of Louis Rubenstein.)

Well, there were complaints about that box No. 7, that it did not work as good as No. 2. They would get hold of the ticket and possibly pull fifty cents worth or a dollar's worth and the others would tear off and turn the box and they would lose their place; and then they could pull the ticket out so much easier and see there was nothing in view but the collar buttons [88] and they would quit right there, or possibly push it back again and the attendant could not see.

I was receiving thirty-five dollars from Holsman before I went to work for Harbaugh.

When I was getting thirty-five dollars a week I had no devices or boxes, or a punchboard, or any sort of a scheme to dispose of that jewelry. That was selling jewelry straight, carrying samples, sample cases.

I got my merchandise from the General Novelty Company in the Phoenix Building. Holsman's office was on the same floor. The merchandise was stored in Harbaugh's office, in the General Novelty Company.

I carried just an order book. The assortments were made up in the office as they wanted to except in some repeat orders. Two or three cameras would go with these assortments. A great many of the numbers had collar buttons on them. There was more than the cameras on that board; there was all sorts of merchandise, altogether about twenty-five, and there would be 2975 collar buttons. There is an example right there. I don't know how it would

(Testimony of Louis Rubenstein.)

figure. I know it was a large board, with a lot of merchandise.

I could not tell in advance of going out on the road just how much business I would do. It was all a matter of chance.

There was the same police interference with these boxes No. 7 as there was with this Plaintiff's box No. 2. I would not tell just when a town would be closed or would be open so far as the box was concerned from the first time I began selling them until I quit in August, 1919.

The MASTER.—Does counsel contend that the interference of the police determines whether a thing is a gambling device or not?

Mr. GOLDSTEIN.—No, but I do say that the interference of the police would make it a matter of possibly a conjecture as to [89] the amount of profits to be obtained. In other words, it is too remote and conjectural, where it is dependent upon the possibility of police interference. Do you get my point?

The MASTER.—I get your point.

I know a man by the name of R. D. Enloe. He had some trouble with the police authorities here—about the same sort of a device at the time I started, sometime in December, 1918.

Testimony of Paul C. Harbaugh, for Defendant.

PAUL C. HARBAUGH testified on direct examination.

Each salesman's orders were entered on his sheet (Defendant's Exhibit 2.) The top of that sheet would be inscribed with the name of the salesman. A notation was made on a card that was filed in the card index under separate states and towns, and such a notation was made on the card which I have here.

The paper identified was offered in evidence as Defendant's Exhibit 9.

The purpose of making the entry of this transaction on the commission record was to keep a record of the commission accruing to the salesman. Paul Enlow worked on a commission. That record shows how much commission he received for this particular transaction. It shows only the total commission that he received. The method of paying commissions was to total the receipts, and at any time that he made a demand for settlement we would pay him his commission on the total amount coming to him. The commission was not paid separately on each sale. The records show that all commissions due him, including the Crouch commission, were paid, after collection of the money from the merchants. The purpose of making my entry on this card which I kept in the card index file of the Crouch transaction was so we could have a sort of handy reference, an index under the towns and

(Testimony of Paul C. Harbaugh.)

localities. For instance if a salesman was going through Oakland, Oregon, we could tell at a glance who the dealers were in that town that he was to call on. And by means of that card [90] index I was able to locate the places where my merchandise boxes were located.

Continuing on through with the entries made with respect to the Crouch transaction: When the money was received an entry was made on the commission record sheets, and that appears here in the Crouch transaction under date of March 18th showing that \$95.00 was received.

There was no regular custom in regard to the payment by the merchants of the amounts due from them; they paid when they got ready and when we could collect it.

The general practice was that the salesman on his following trip, after the sale made an effort to collect it if it had not been paid before and at the same time sell him a new one. In many instances, however, he was not able to collect. They would not pay, offering some excuse, and we would have to wait until the next time, or probably we would solicit payment by mail. Some times considerable time would elapse before I got my money from a transaction.

Continuing further with reference to this transaction, an entry was also made in the journal of the amount received. That entry appears on page 2 of the journal. The name "Crouch" does not appear

(Testimony of Paul C. Harbaugh.)

in connection with that entry, merely the amount. Merely totals were entered in the journal.

I would be able to determine the net profits I made out of that transaction by deducting all the expenses from the amount of \$95.00. The expenses could not be determined except in specific instances. They could be approximately, however.

I am able to state the amount of net profits that I made out of this business from the time of its beginning until the time I was enjoined from the use of these boxes. I have prepared a statement showing such net profits. I prepared that statement [91] by using the salesman's record sheets, the journal and the ledger.

Mr. GEISLER.—I would like to offer this in evidence for the convenience of the Court so he may be able to determine without taking each figure down as the statement is made.

Mr. GOLDSTEIN.—There is no objection as a means of convenience for the Court illustrating the statements of the witness, but not as to its accuracy or correctness of the items and the method used in arriving at it, or as the original record.

The MASTER.—It will be received as illustrating the testimony of the witness and not as an original record or as evidence of the facts contained therein, marked Defendant's Exhibit 10. (Summary.)

The volume of business I did for the preceding forty-five days, I mean preceding being enjoined, was a total of \$11,266.00. That was the gross receipts after deducting the dealers' commission of

(Testimony of Paul C. Harbaugh.)

thirty per cent but without deducting the salesman's commissions. In order to arrive at the profit it would be necessary to deduct the cost of the merchandise. That was \$5,644.00. I will explain how we arrived at that. By merely deducting fifty per cent of the total receipts, that is the amount of the cost of the merchandise. That would be the maximum and would usually be considerably more than the actual cost, but that is the way we figured it. Then the commissions paid, \$1,213.19 to salesmen. That is exact. All other expense \$765.00. That was arrived at by taking the total expenses for February and March and using seventy-five per cent of that total to cover the forty-five day period. My net profits for the period of forty-five days was \$3,664.81.

We had been threatened with injunction for some time, I don't know exactly for how long, and some time before being served with papers enjoining us, I had endeavored to make up another box that we could use in case we were enjoined from the use of the [92] one we were then using. This is Exhibit 7, the round box.

Being threatened with injunction affected my business. Letters were received by our customers. Some of the customers showed me the letters they had received. I saw two of these letters. I am not able to say as to by whom those letters were signed. I don't know where those letters are. I have made a search for them but have not been able to find them.

(Testimony of Paul C. Harbaugh.)

To replace the enjoined boxes we made up a new box which our attorneys advised us did not infringe on any patents and we put that in use. I attempted to put out that new box in California in the vicinity of San Francisco, but had no success at all. I found the dealers were using Mr. Dwyer's box put out by a concern under the ownership of R. H. Enloe in that territory, and we could not get our box in at all. The objection of the dealers to the use of our new box was they did not like it as well as Mr. Dwyer's. The cost of these new boxes was five dollars each. I had two hundred made. I endeavored to continue my business after the injunction was served up to January, 1920. Then I discontinued trying to put out any boxes because it was unprofitable. We were not doing enough business to make it pay. Our receipts steadily dwindled and we were operating at a loss.

In some instances the merchants received these circular boxes and used them but there was a general disinclination to use them because of their bulk and other objections they had to them. I made a computation as to the way in which our business fell off after the injunction. It is included in Exhibit ten.

In April our receipts dropped to \$2,684.56 and our net profits to \$470.29. In May the receipts from the business were \$4,239.83 and the net profits \$310.36.

This exhibit is based upon my knowledge gathered from the books. Receipts from the business done in June \$1,620.27, net loss of \$318.27. All these months

(Testimony of Paul C. Harbaugh.)

were in 1919. Receipts from business done in July \$360.34 with a loss of \$172.64. Receipts from business done in August \$822.32, with a profit of \$133.75. [93] Receipts from business done in September \$488.93 with a loss of \$29.69. In October, the receipts were \$555.44, net profits \$75.66. In November the business done was \$248.58 with a net loss of \$43.67. In December the business done amounted to \$190.00 with a net loss of \$250.75. I have no figures for January, 1920. That is when we stopped putting these out.

The restraining order was served on March 22d, 1919.

These figures show the conduct of the business and the results of the operations to January, 1920. There are no figures here for January, 1920.

Cross-examination.

The General Novelty Company was formed in January, 1919 or late in December, 1918.

The first sale appearing on Defendant's Exhibit 10 indicates it was made on February 10th, 1919. The business had been started a month when the first sale was made. The purpose of this business was to sell merchandise by means of these tickets. I bought the merchandise outright from various stores, but principally from I. Holsman. I have no records showing from whom I purchased merchandise. I have no records showing what the merchandise cost. I have records showing the money paid to I. Holsman & Co. The other purchases were

(Testimony of Paul C. Harbaugh.)

small and are listed under merchandise bought. Very nearly all my merchandise was bought from I. Holsman & Co. The amounts bought elsewhere were so trifling as to be insignificant.

From about January 1st I was employed by I. Holsman & Co., as salesman of jewelry. I was managing his wholesale jewelry business at the same time I was running the General Novelty Company. The offices were in the same building and on the same floor but in different rooms. I managed the General Novelty Company at intervals during the day. I drew from I. Holsman & [94] Co. \$300 a month. I am not able to state how much I got from the General Novelty Company a month. The books will show. I had no salary from the General Novelty Company. When I took money out of the General Novelty it was in cash. We had a checking account, for the first month. I have not the check stubs. They were kept for a long time but have been displaced. The entries in these books are made from the check stubs.

The money I received the first month was put in the bank; after that it was kept in the office and expenditures made from that. I never had a checking account after the first month. I kept the cash in the safe of I. Holsman in a separate compartment used for the place to keep the money of the General Novelty Company. It would have been safer in a bank but I was afraid of being attached by Mr. Dwyer. I first had that fear some time around February 10th, I think.

(Testimony of Paul C. Harbaugh.)

I received \$4,146.55 during the month of February from the business. The original entries of that amount were made in the journal. For instance the entries showing the Crouch account is on page 2. The entry there, Petty cash \$95.00, means that the money was put into the petty cash. I have no book of petty cash showing the items of petty cash. There is an entry of the items of petty cash in the salesmen's commission record. The pencil notation there was merely a memorandum and I intended to take it out.

The handwriting on page one of the journal, Exhibit Five, is mine. I don't know the exact date I made these entries. I made all the entries starting with February 12 down to March 11th at the same time.

During the month of February Miss Sullivan was in my employ as bookkeeper. I don't know why the entries were not made by Miss Sullivan. These are her entries of cash receipts in the month of January. None were made by her during February. A [95] possible explanation is because she had not had the experience of doing bookkeeping and I was showing her how to do it, how I wanted the books kept. In January they were made under my direction.

I can give a theory for the mutilation on pages one and two of the Journal at the top; something cut out. This was an old book and had evidently been heading with something else before I adopted it for my business. I believe it was an old book that formerly belonged to I. Holsman & Co.

(Testimony of Paul C. Harbaugh.)

Question. And they had their name at the top of that sheet and you cut it off; you erased it from the top of that page?

Answer. Evidently there was something there that I did not want there.

Question. And so you cut off the name of I. Holsman that appeared at the top of the page of your journal because you did not want their name to appear in this General Novelty Company's business which you claim belongs to you. You did not want their name there?

Answer. No.

I was the sole operator and owner of the General Novelty Company, and any damages accruing from the injunction is a damage only to me and I am entitled to it. I had no merchandise on hand when I started to do business.

The original entries showing the merchandise purchased are in the journal. The item on January 31st, merchandise, I. Holsman & Co. \$3,390.93, means that I bought during that month merchandise from I. Holsman aggregating that amount.

I have no entries of the various items making up that amount. Miss Sullivan probably made the entry January 3d or 2d. I am not sure. That is the first entry shown for merchandise during the month of January. On February first I had that much merchandise on hand. I can testify from my own knowledge that [96] \$3,390.93 was paid to I. Holsman & Co. for that merchandise, in different amounts at different times.

(Testimony of Paul C. Harbaugh.)

My attention being called to page 100 of the ledger, and to the payments to I. Holsman & Co. in even amounts, \$300, \$400, \$100, \$500 and \$300, that was my method of making payments to I. Holsman & Co. I did not pay him then according to the amounts of the invoices. I paid him different amounts on account.

No payments were made during the month of March. My statement that cash was paid for that was incorrect. I gave Holsman & Co. credit for merchandise he sold me without paying him any cash at any time. I am supposed to pay for it as fast as I could. I have no records or vouchers or invoices showing [97] what these sums constituted or how this total was reached.

Taking the summary of sales, being Defendant's Exhibit 10, the first sale was I. J. Ely of Clatskanie. I don't know who he is.

The original order shows that on page 11 there was a sale to I. J. Ely of Clatskanie for Assortment No. 101 at the price of \$150, less the dealer's commission of \$45. Total of \$105, box No. 23. The fact is that that was not a sale but this merchandise was placed on consignment with Ely to the end that when the merchandise was disposed of such money as had been received should be sent to me less the commission. The full assortment was not always sold with the box; nor would the assortment be sold in any fixed period of time. It all depended on the trade that the man had. It depended upon his ability to dispose of the stuff and the business con-

(Testimony of Paul C. Harbaugh.)

ditions of the town in which he was located and upon the permission of the police authorities of the place to allow him to have the stuff there for sale.

It depended upon a number of circumstances as to the time in which he disposed of the assortment and with respect to that it might take a week or a month *or* several months to dispose of the entire assortment and when I received my money for the merchandise I would still have the title to that box after several months if he had not sold the goods or made some other kind of a settlement. That was the theory of it; it didn't always work out that way.

This first Order No. 101 consisted of as noted on the back, one camera \$5.50, two manicure sets \$6.00, one knife and chain set .50, two belts 80 cents, four pair of links 50 cents, six scarf pins 60 cents, two cigarette cases \$1.00, two watches \$2.50, six knives \$1.50, four rings \$2.00, one poker set \$4.50, one toilet set \$5.50, seventeen boxes \$5.50, forty-nine articles for \$36.30.

The boxes were jewelry boxes. That is a total of [98] \$36.30 for 49 articles in addition to 3,000 collar buttons. This is what they cost me. The collar buttons cost \$6.00. I bought them from the Ecola Company in my name. I have no invoices for them.

Referring to the 17 boxes in this assortment number one; they were merely containers for these different articles in which they were placed when they were sold. They were not separate articles they went with it, so that instead of 49 articles there would be 17 less than that, or 32 articles. In addi-

(Testimony of Paul C. Harbaugh.)

tion to the 32 3,000 collar buttons costing me \$6.00. That is the price to me from I. Holsman.

I know what these articles cost I. Holsman approximately. They would be the same as they cost me in one or two instances only. The one that I recall is the camera. It cost him \$5.50 for the camera and he charged no profit on his merchandise to me for the camera. The camera is the largest article in the outfit. He charged no profit except perhaps two per cent cash discount, or something like that. He would get the cash discount.

Each box that I consigned with this merchandise contained 3,000 tickets, and the method of selling this merchandise depended upon the sporting instincts of the people who were buying the goods.

Take the Ely case again, to whom I consigned this merchandise on February 11th. Upon receipt of the order I made a card and marked thereon the consignment of this merchandise. This was merchandise which I had on hand from I. Holsman & Co., which I secured during the month of January and which I had not yet paid for. This merchandise was paid for by Ely on March 13th. That indicates that Ely had the merchandise in his possession a full month before he was able to dispose of it assuming that he was honest.

I had a cash-book indicating the money received during [99] that time. I have not got it. I don't know where it is. That cash-book should and would show the receipt of money during the time.

The \$105 received on March 13th we used *used*

(Testimony of Paul C. Harbaugh.)

for various expenditures of the business. There was a list in the cash-book referred to, there was a list of expenditures which at the end of the month were segregated and entered in here.

I admit now that I don't have the original record showing the receipts of money secured and the disbursements of money for expenses.

On this \$105 that I received Mr. Leven, the salesman was paid 15%. That would be \$15.75. A record was kept of the payment of money to the salesmen, on the salesmen's commission sheets. The record of \$15.75 paid to him is probably included in this \$42.15. There would be several commissions lumped in. There was also an entry in the cash book. I have not got that. That entry was made at the same time this was made.

Here is an order dated February 10th for assortment No. 101 for A. J. Kelly of St. Helens. A card was made for that order. There is an original record showing the shipment of that merchandise here on the salesmen's record sheet under Ben Levin. My record showing the record of items of merchandise disposed of or sold or consigned is indicated by the assortment number 1. We knew what was in it. There was an express receipt. I don't know where it is.

Referring to the card to R. A. Stewart, this may be the same order as referred to by the name of A. J. Kelly.

The record showing when that consignment was paid for is on the salesmen's record sheet under Ben

(Testimony of Paul C. Harbaugh.)

Levin. It was paid for March first. The handwriting is mine. I don't know why I put the name of Kelly on the card. It may be that Kelly and Stewart are the same. There must be some mistake there. I don't know what it is. [100]

My summary, Exhibit Ten, of sales made during the months of February and March previous to the injunction, include one to L. L. Frazer, St. Helens, under date of March 1. The index card shows that on March first assortment 101 was shipped to L. L. Frazer at St. Helens, Oregon.

This was not an outright sale on March first but that the title to the merchandise was still in the General Novelty Company, as appears from the following: "These goods are placed on consignment with the understanding that the title to same remains with the selling until paid for at the price and terms named above. Purchaser agrees to take the goods and pay for the sold portion at terms stated at any time upon demand of seller or his representative. Purchaser also agrees to provide a safe place for the above merchandise at all times and to assume full responsibility for loss by theft, fire or other contingency. I hereby agree to the above conditions and understand that no other conditions than those specified hereon will be recognized."

The records show that that consignment finally passed into a sale and the purchase money paid on May the 3d. That \$105 is included in our estimate of merchandise sold previous to the injunction. I

(Testimony of Paul C. Harbaugh.)

suppose the merchandise was not sold until after the injunction, and on May the 3d.

That order was contingent upon whether the goods were disposed of or not and until it was paid for the sale was not completed and remained in the seller.

I don't remember what efforts I made after the injunction in that particular case. In all cases the salesmen we had were instructed to substitute the new box and take up the old one. From the records it would appear that Frazer had received the box marked "Exhibit 2 for Identification."

The consignment made during the month of February to R. A. Stewart of St. Helens which record appears on page 10, that assortment was under consignment. The same would be true as to [101] whether or not it was sold or placed there on consignment as testified by me with respect to Frazer subject to the same terms and conditions.

The money was received on May 3d. I cannot state what efforts were made to get the box back from R. A. Stewart after March 27th and settle up with him for any merchandise he had sold up to that time.

I can remember quite a number of instances where we attempted to substitute the new box for the old. It would be necessary to take in another deal and put out a new box, and the dealer refused to do it. They seemed to think it was some kind of a scheme on our part to take away from them articles still in the assortment.

(Testimony of Paul C. Harbaugh.)

On the orders of Frazer and Stewart the original boxes were in their custody until May 3d.

I can't show when the boxes were returned, Defendant's Exhibit 2, I can only state that the money was received on May 3d. It is possible that the boxes were sent back some time previous to that. In some instances I put a notation on the index card showing when my boxes were returned.

Referring to the card of Frank R. Stowell, Buxton, Oregon, it appears that on February the 22d or the 24th, it is not plain, Frank R. Stowell agreed to accept on consignment Assortment 101. On May 2d was received \$30.00, and on June 5th \$50.00 and on July 12 \$15.00.

There is a notation showing the box was returned on that date. It appears after the item on January 12th and probably refers to that date. The box covered by that transaction is the same box that I was enjoined from using, this Exhibit No. 2 in the District Court.

In connection with the Stowell account, that is similar to the others I have referred to, in that they do not constitute sales during the months of February and March, but that the sales [102] were consummated after the injunction was issued. That may be true in a number of instances with respect to these items that appear on my books.

It would be impossible to state definitely what amount of business I would be able to do the following month, assuming I could use this box (Plaintiff's Exhibit 2) because of certain business condi-

(Testimony of Paul C. Harbaugh.)

tions that existed generally throughout the country. It might depend on the business ability of the people with whom these boxes were placed. On the retail trade they got during that period. On the state of business conditions, whether it was a healthy condition or sluggish where the boxes were placed. On the spending ability of the people who patronized the merchants with whom the boxes were placed. Also on the acquiescence of the police authorities in their disposition to allow the stuff to be sold in the manner in which it was sold, whether the returns would be little or much. There have been a number of cases where I have been compelled to discontinue the use of these boxes in certain localities because of police interference. This has been true in certain localities in both Oregon and Washington and might be true any place. In other words, this device has been construed by a number of police authorities as a gambling device.

Referring to page 35 of the ledger under merchandise sales, that represents the actual total amount of sales made during the month of February and of March. It shows the completed sales made during the months of February, March, up to and including March 26th, my total was \$3,789.35. Therefore the difference between that and what I claim in my summary, Defendant's Exhibit 10 of net return from sales during the period, \$11,266.00 must have been money taken in subsequent to the issuance of the injunction. I did not get this return during that period. The amount received sub-

(Testimony of Paul C. Harbaugh.)

sequently was taken from orders placed previously to the issuance of the injunction for which the money was not received [103] until afterwards. We do not always get our money when we do the work for anything. In this case the work was done and the sales made but the money was not paid until later.

The cash returns from sales made during the period between February 10th and March 26th is \$3,789.85. I had a cash-book showing the daily receipts. We had cash sheets on which the entries were made each day and I checked that each day.

The account I have shown of I. Holsman & Company shows that \$8,384.00 of merchandise was purchased from I. Holsman & Company between January and May 31st. Even sums of money were paid to Mr. Holsman on account of these purchases for this business, I think all cash.

I don't remember whether I would get receipts. I would pay him from \$450 to \$750 at a clip without getting a receipt for it. The only entries made of those payments were made in the journal and transcribed to this. These entries on page 4 of the journal were made March 31st or thereabouts, if the transactions took place during the month of March. [104]

I made these entries on March 31st from the cash receipts and were then totaled up. I cannot locate these cash sheets. In explanation of that let me state that when I left Mr. Holsman's employ I kept a desk in his office and left all my records there as I had taken them there for safekeeping after I had

(Testimony of Paul C. Harbaugh.)

quit this other business; that included vouchers, invoices and all other papers and books of my company, and when he went out of business they were all stored in the warehouse, Olson & Roe's warehouse and they were all taken down there together, and I went down and made a search for them but could not locate them—all of them. That is the reason I have not got them.

My bookkeeper on March 31st was Miss Sullivan.

These entries are in my handwriting. It was necessary for me to make these entries probably because she did not understand how to make them correctly, or something, I don't remember. I don't know how it happened that the entries of March 31st were made subsequent to April 24th items. Miss Sullivan was bookkeeper for me in the month of April.

All the entries of Holsman are in my handwriting. I made the cash record at the end of the month because I took special care of it; there were large amounts involved. I wanted it to be right.

This item, merchandise, \$913.52 was money paid out for merchandise to others than Holsman. These items are in the ledger. I cannot state offhand how it happened that I paid Mr. Holsman \$9,625.00 in cash apparently and merchandise \$2,257.00 making a total of \$11,882.99 up to December 31st, 1919, when I only owed him \$8,384.00.

This \$2,200.00 Journal entry on page 30 was cash. I paid him.

(Testimony of Paul C. Harbaugh.)

The MASTER.—Was that \$8,498.00 actually paid over to him: This account shows on February 10, 1919, that you paid [105] Holsman, \$5,147.00 more than you owed him.

There was consideration there. At the time I gave up this business I had a lot of merchandise, stuff of that kind on hand, that would be almost worthless to me and he took that stuff over and took all the accounts we owed over, and we made a settlement of some kind. I was looking for the inventory at the end of the year to see how much it was. (Witness examines his records.) There is an account here headed “merchandise,” I believe.

I paid him such money as I took in and received credit for it from him, with the understanding that we were to have a settlement later. Now, that brings us into subsequent transactions it might be well to explain. Early in 1920, after the close of the year 1919—or to begin with an explanation of the situation, Mr. Holsman was operating two retail stores on Washington Street, the Crescent Jewelry Company and the Keystone Company, in each one of those he had a manager who received a salary and a percentage of the profits. Fifteen per cent, I believe, was what they received, and he also operated I. Holsman & Company as a wholesale jewelry concern. After the close of the year 1919 and about the early part of 1920 the four of us, Mr. Holsman, Mr. Savan who was the manager of the Keystone Company, Mr. Flatow who was the manager of the Crescent Jewelry Company, and myself entered into

(Testimony of Paul C. Harbaugh.)

an agreement which was substantially as follows: In consideration of my turning over to Holsman what credit I had coming on his books and turning over any merchandise and fixtures, and so forth, that I had on hand using in the General Novelty Company, I was to receive an interest in all his other stores, ten per cent interest, and Mr. Savan and Mr. Flatow were to pool their share of their profits—they were to relinquish those, rather—Mr. Savan was to relinquish his fifteen per cent of the profits in the Keystone Jewelry Company and Mr. Flatow was to relinquish his fifteen per cent in the Crescent Jewelry Company, in consideration of receiving seven and one-half per cent of the profits of all [106] of the business combined—that is of the pool. In other words, Mr. Holsman was to receive seventy-five per cent, Mr. Savan and Mr. Flatow each seven and one-half per cent and myself ten per cent. That was the agreement that we entered into and for which I turned over this money and this merchandise and accounts. There were some accounts of the General Novelty Company outstanding not collected yet, various things of that sort.

On journal page 30 it looks as if two hundred and twenty dollars was changed to twenty-two hundred. The figures are those of Miss Sullivan. I first noticed this change now.

The posting of this amount of 2200 or 220 into the ledger was Miss Sullivan's writing, but I am not certain about these figures. They don't look like mine. Mine are immediately above there; this here

(Testimony of Paul C. Harbaugh.)

is mine. That 30 appearing alongside the 2200 is in my figures.

Page 101 of the ledger shows that on February 9 and February 10 I paid Mr. Holsman \$595.41 and \$116.38 respectively; that was money coming into the General Novelty Company and turned over to him. The consideration for that was the agreement I have described. It was an oral agreement only. Mr. Holsman and Mr. Savan and Mr. Flatow have knowledge of that agreement.

I turned the accounts the General Novelty Company had against people over to Holsman. Holsman was going to have as his share in the profits of the general Novelty Company Seventy-five per cent, by the agreement we entered into in 1920. Previous to that time I had no arrangement with him for any share of profits.

Part of these boxes, Plaintiff's Exhibit 2 in the District Court were built by Louis Herder, who is now associated with the American Showcase Company, and another part were built by some other man. Two hundred were built. I believe they were invoiced to I. Holsman at \$2.50 a box. I paid for them.

Here is an entry of part of it. Page 1 of the journal, and item of \$176.75 and on the same page an item of \$320.00 [107] The original entry from which I made this item, Furniture and Fixtures, \$176.75 was made on a cash sheet that I have lost. Now this other item Furniture and Fixtures \$320.00

(Testimony of Paul C. Harbaugh.)

under February 28 I entered from the cash sheets. I paid this in cash.

These tickets, being the tickets found in Plaintiff's Exhibit No. 2 in the District Court, I think were printed by Hancock Brothers, in Oakland or San Francisco; I don't know which. I ordered them; I believe they were invoiced to I. Holsman & Company.

I haven't any correspondence left; it was lost.

I testified in the Federal Court in the case of Dwyer versus Holsman as follows: "Now, as far as new business was concerned after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced as Plaintiff's Exhibit 2, I built still another kind of box."

I also testified at that hearing, in answer to Judge Bean's questions, that this whole thing was in the nature of a gambling device, it was a matter of chance. I, at that time, was operating these plaintiff's Exhibit 2. My organization consisted of a bookkeeper and salesman. I think I paid Winnie Sullivan, the bookkeeper twenty-five dollars a week or one hundred *hundred* dollars a month. My salesmen were Ben Levin, Paul Enloe, and Max Schultz, who all worked on a commission basis. I paid Louis Rubenstein fifty dollars a week, or two hundred dollars a month.

I don't remember what the rent was but I paid it to a concern in the Phoenix Building. I paid all of the rent by cash and the amount was between

(Testimony of Paul C. Harbaugh.)

fifty and sixty-five dollars a month. Nothing that I have shows the payment of rent.

I don't know that the Keystone Jewelry Company and the Crescent Jewelry Company also filed their articles the same day, and that Savan Filed assumed ownership for the Keystone and Flatow for the Crescent Jewelry Company. Those are the companies [108] which were owned by Holsman prior to December, 1920. I don't know that the facts were stated that it was owned by Holsman, but I knew Holsman owned them.

I paid Holsman all the sums that are listed in there. At any time I wanted to, without a demand for those payments, I draw those items listed, and referring to page 50 of the ledger the first withdrawal is March 31, total \$35 for the month of March, which is all I withdrew in the month of March.

In the month of April all I withdrew was \$105.00 and in the month of May all I withdrew was \$270.00. I did not have any fixed sum to withdraw any particular week, but only as I felt like it. And at the same time, referring to page 100 of Holsman's in the month of March, I paid him back.

In the month of April I paid him additional sums of money, making a total up to that time of \$4,125.00. I was also drawing out thirty-five dollars a week, and also in the month of July, \$100.00—July 15, \$100.00, July 25, \$35.00, August 5, \$100.00, July 31, \$35.00. In explanation of how an early date follows a subsequent date; for instance, of how an en-

(Testimony of Paul C. Harbaugh.)

try of August 5 appears subsequent to that of July 31, it is evident that this is the result of an error in posting. In other words, the item was not posted, a mistake on the part of the bookkeeper, and later she discovered it and posted it.

It also shows in the month of July I took out \$170.00 and the month of August I took out \$200.00.

Referring to card of B. A. Hunsaker, Roseburg, Oregon, it appears thereon that on February 26 assortment No. 101 was shipped to this man, and on April 3 I received a check on account for \$31.50; on May 13 another check of \$63.50.

The usual method of doing business as I was conducting it was to take what proceeds had been obtained from the sale of merchandise, allowing him his commission unless he intended to continue with the box and dispose of all the merchandise.
[109]

I have no knowledge of individual transactions and thus I do not know why it was that I didn't immediately take back the box on April 3, with the balance of the merchandise as required by the injunction, but it frequently happened that we made an effort to replace the old box with a new one; in every case our salesmen had these instructions, but it frequently happened that the dealer refused to turn them over or was disinclined to.

From this record it appears that box Exhibit No. 2 was returned after May 13th; and on May 13th I received another remittance from this same

(Testimony of Paul C. Harbaugh.)

box, as well as the remittance of April 3, and the box was not returned until after May 13.

The card of M. McGuirk, Medford, Oregon, shows that on March 5 I shipped him Assortment No. 101; that on April 5 I received a check on account of \$21.35; and that on May 15 I received a check in full and that the box was returned. That indicates that he was permitted to keep that same box after April 15th. And the box was not returned until after May 15, when the balance of the merchandise, or as much of the merchandise as could be sold was sold.

Now, referring to card of George W. Staley, Roseburg, Oregon, notice that on February 26 I delivered him assortment No. 104; that on April 3 I received check on account of \$25.00; on April 13 I received another check of \$25.00; on May 26 I received a remittance of \$20.00 and on June 20 I received the balance in full of \$35.00, making a total of \$105.00, and on June 20 the box was returned. That shows that he was permitted to have in his possession from the time he received it Plaintiff's box Exhibit No. 2.

Referring to card of F. M. Wilson, Medford, Oregon, notice that on March 5 I shipped him assortment No. 104; that on April 5 I received check for \$19.40; that on May 15 I received a check in full of \$6.65 and that thereafter the box and the [110] balance of the merchandise was returned.

That shows that he was permitted to keep the box after April 5, when the first installment was

(Testimony of Paul C. Harbaugh.)

paid. In all of which cases one remittance was received subsequent to the injunction and a last remittance and the box were returned after the first remittance. And some of these remittances were made in the form of collections by the salesmen when they called. The records would not show it. It was the usual procedure to have the salesman call in person and take a reorder or take what remittance he could get.

Now, calling attention to the card of Thorpes Smoke House, Pullman, Washington, notice that on February 13 assortment No. 102 was delivered by Schultz and notation thereon it appears that March 13 I wrote him for remittance; on March 31 there is a letter from Rubenstein wherein he states the town is closed and that on April 1 the box was returned.

That indicates that the box was returned because of the fact that the town was closed subsequent to March 31, from the appearance of this card, and I could not tell when similar returns would be made because the police would step in and do their duty.

(Question by the MASTER.)

In the month of April you have listed here as the net returns from sales \$2,684.56?

That was money was obtained from the sales of merchandise put out in the field after the twenty-sixth of March. It represents cash received from merchandise put out in April. In other words, we may have put out an amount of merchandise con-

(Testimony of Paul C. Harbaugh.)

siderably in excess of that amount in April, but that was the actual cash received for all merchandise put out.

In May you have listed here \$4,239.83.

That represents cash returns from merchandise placed [111] with the dealer in May, none of which represent cash received for merchandise put out in the field in April. In this summary the balance of the money obtained from the sale of merchandise put out in April is shown on lists of each account sold or of each one placed. For instance, in April we placed merchandise with all of these different parties on the dates shown. Opposite in this column is shown the amount of money received applying to that transaction. The amounts were received at various times. That might be received in June or July, or May or at any time.

The sum of \$11,266 which I show as the net returns from the sales made between February 10 and March 26 does not represent money that was actually received during that period, but is the total cash returns from merchandise put out during that period.

The cost of merchandise was figured from the amount received and assumed that the merchandise cost fifty per cent of that amount. The reason I could trace out the cost of that merchandise accurately was because the assortment would be placed and partly run off. That is, we would re-

(Testimony of Paul C. Harbaugh.)

ceive, say, seventy-five dollars and certain merchandise would come back. We would not keep a record of what merchandise came back, only of the cash received.

The amounts in the books represent actual commissions paid. For instance, here is the amount \$52.32 paid for the month of August, which commissions were paid upon orders received in August.

There was no difference in the amount of police interference between February and March and the latter part of March and from April on.

We made an attempt to recall the boxes which were out without waiting until they would run off the merchandise that was represented by the tickets in the boxes and attempted to substitute these other boxes in each case. But in many cases the dealers [112] refused to give them up. They said, "Well, here, most of the main prizes are left, the cameras, for instance, are left, and my customers have spent considerable money and got very little for it and now they want the privilege of getting those cameras," and they thought it was simply an excuse on our part to get those cameras back without giving them a chance at them. No commissions were paid on the business originating in July, August and September. Also October, November and December, because we had no men working on commission. We had only one salesman at that time, if any. I don't know when

(Testimony of Paul C. Harbaugh.)

Rubenstein quit, but about that time we only had Rubenstein, and, in fact, most of our business at that time was done by mail. It didn't pay us to put a salesman out.

There is a relation between the amount of money paid Holsman and the amount I show here as the cost of merchandise because merchandise was billed to me from Holsman and credited to his account here. Amounts that I gave him were in payment of those bought to the amount due and there was additional payments. And the fact, the procedure was that all money I got in outside of what I needed for other purposes I turned over to Holsman.

The reason that I paid Holsman twenty-two hundred dollars on the second of September was because all money that I got in I turned over to him, with the assumption, the understanding that for what I turned over to him there would be a settlement of it and I overpaid him because he needed the money at that time and I didn't. At that time he was heavily in debt and the reason you find on December 31 another charge made of merchandise from June 1 to December 31 in the amount of \$2,257.99 was because during that time Holsman had been taking back merchandise that I had on hand in small amounts at a time, as fast as he could use it. We kept a record of that and then the total was entered. [113]

I made further payments to him of \$595.41 on February 9, 1920, \$116.38 on February 10 of the

(Testimony of Paul C. Harbaugh.)

same year and then a cash payment of \$1,541.47. For the same reason I overpaid before, I continued to turn over accounts. An estimation of the value of accounts outstanding, I was turning those over to Holsman and estimation was made of their value. On December 31 I had overpaid Holsman \$34.98.

Now, then, I paid him \$700.00 more within the next two months. In the meantime, some time around December 31, I entered into an agreement with Holsman and Savan and Flatow to pool all our interests and turn over all these moneys, anything that came in was to be turned over to Holsman. That is the reason these were turned over. Mr. Holsman had an interest in that business after that time.

He didn't have an interest in the business in October 1920. He didn't have a direct interest in the profits of the matter, outside of the sale of the merchandise. He was interested in the outcome of the trial because if I were enjoined from continuing in business Mr. Holsman could not sell any more goods and it was primarily for the purpose of eliminating a lot of testimony and arguments. The plaintiff wanted to connect Mr. Holsman with it so that if he had to collect damages he could collect from Mr. Holsman, and in order to avoid any discussion.

Cross-examination Continued.

The merchandise billed to me was not billed at

(Testimony of Paul C. Harbaugh.)

cost. The Gillette razors were billed at cost. I am not certain whether the cameras were billed at cost or not.

Invoices made to me have been misplaced. I believe I could get copies of those invoices.

Assortment marked Plaintiff's Exhibit "A."

I do not believe profits were made on the kodaks, so far as Holsman was concerned. There was profit on one manicure set [114] but I don't know the amount. I know there was a profit because I know he billed them to me at a profit and they cost him about thirty cents less; thirty to fifty cents. Profit was made on two Icy Hot bottles but I don't know how much.

I was acting in a dual capacity of manager of Holsman & Company and the owner or representative of the General Novelty Company. I didn't bill these things out but merely superintended it.

The only articles I know he got a profit on are, two Icy Hot bottles, three dollars; two pair of links, fifty cents; one clock one dollar and a quarter; two cigarette cases two dollars and a half; two brooches, sixty cents; two flash lights one dollar ninety cents; two pair of brushes at two dollars and a half; two scarf pins at eighty cents; two cards in cases, one dollar four cents, and six boxes, two dollars twenty cents. No profit was made on the Gillette razor and I don't know about the kodaks; I believe there was no profit on them; I may be mistaken.

(Testimony of Paul C. Harbaugh.)

I know there was a profit but I don't know the amount on any of the articles.

I testified as to a certain transaction with one Crouch of Oakland, Oregon, then traced it out and I testified that the reason I was unable to do much business subsequent to the issuance of the injunction was because the use of these circular boxes No. 7. This card of Crouch, Oakland, Oregon, upon which it appears that on May 6 there was an assortment shipped and on July 31 I received in full \$84.98 and there are pencil notations on it which says "Advised P. V. E. town closed on 20," so as far as the Crouch transaction is concerned, at least, the reason I could not do any further business with that gentleman was because the town was closed; which means police interference at the time.

Testimony of Sam Flatow, for Defendant.

SAM FLATOW, called as a witness on behalf of the defendants, being duly sworn, testified:

I live at 294 Washington Street, and am thirty-six years [115] old. I know Mr. Paul Harbaugh, and the General Novelty Company; I know that Mr. Harbaugh owned the General Novelty Company. I was in his employ and tried to put out some of the merchandise selling boxes for the General Novelty Company during a period within two or three months after the injunction. I took out the round, circular boxes, but the trip was an absolute failure. Altogether I made quite an ex-

(Testimony of Sam Flatow.)

tensive trip, starting here at Portland, and going to Spokane; from Spokane to Helena, Helena to Billings, Billings to Cheyenne, Wyoming, Cheyenne to Denver, Denver to Grand Junction, Colorado, and Salt Lake City, and then back to Portland, again.

They were a little bit too bulky and they didn't like the style of the box. That was the biggest complaint, was that it took too much room on the counter; that was the biggest complaint. And there was a few other features they didn't like about it; for instance, most of them had seen other boxes and said they had the tickets right in front of them and this one here was in six different sections and had to keep turning the box around, and one party in particular I spoke to said it didn't work as good as this box here, the tickets used to get caught and jam.

Some time subsequent, some several months, I remember an agreement that was entered into between myself and Mr. Holsman and Mr. Harbaugh and Mr. Savan. We had an agreement to pool all the profits of the Keystone Jewelry Company, of which Mr. Savan was the Manager, and the Crescent, of which I was the manager, and Mr. Holsman's wholesale house, and the General Novelty Company, and Mr. Savan and I were to get seven and a half per cent of the profits, besides the salaries we drew from the store, and Mr. Harbaugh was to get ten per cent of the profits. What his

(Testimony of Sam Flatow.)

salary was I don't know anything about that. I was not interested as a partner but in the profits only; that didn't give us any privilege in the stock and we were to account to each other for the profits [116] and settle accordingly at the first of the year.

Cross-examination.

I have known Isadore Holsman about five years. I first entered his employ four years ago on the fifth of December. I was employed as a salesman in the Crescent Jewelry Company which he owned, and ran under an assumed name. I continued in his employ until I bought him out; bought his interest out last September. I went out on the road in the year 1919 for Harbaugh, or the General Novelty Company because business was a little bit quiet.

My salary was the same while working for the General Novelty Company as it was while working for the Crescent Jewelry Company except then my expenses were added to it and I maybe had another thing, that is what probably induced me to take the trip for Mr. Harbaugh, was that I had a brother in Salt Lake City and I saw a chance for a little visit with my brother and that happened on my route, so that decided me to take the trip. My salary for the three weeks was \$105.00 and I got cash for about three hundred and fifty dollars from the General Novelty Company.

Mr. HARBAUGH.—This sum was included in

(Testimony of Sam Flatow.)

item in the journal, Defendant's Exhibit 5, on page 11 in the amount of \$1569.49.

I first went to Spokane and I just had the samples of three boxes and three separate boards with me. I did not dispose of any of these in Spokane nor any of these boxes on the road at all because none of them wanted to put them in. I called on half a dozen different people in Spokane. When I went to Salt Lake I went on more of a visit there than I did to put out those boxes.

I signed my name to the certificate of assumed name on file with the County Clerk's office in this county for the Crescent Jewelry Company. It must have been considerably over a year after I was first employed, and had only a commission interest, besides the salary. It wasn't true, at the time I signed my name that I was [117] the sole owner of the Crescent Jewelry Company, but I signed for the purpose of keeping Holsman's name out of it, on account some of the wholesale houses didn't want to sell him goods on account of being connected with a retail store. There were no written articles of agreement because we fellows trust one another. Holsman was a party to the agreement.

I didn't know what the profits of the General Novelty Company were but I knew that the Keystone made money and the Holsman company made money and I was getting ten per cent of the profits of the Crescent Jewelry Company at that time

(Testimony of Sam Flatow.)

and I knew the profits of the Keystone Jewelry Company and I. Holsman and Company and the Crescent Jewelry Company if I was to get seven and a half of the combined profits of that, I knew that would far exceed the ten per cent I was getting of the Crescent Jewelry Company, and that was enough for me and I was not depending on anything that the General Novelty Company had done or could do, but I figured if others could make money I could do it. How much I didn't stop to figure. I knew that the two, with the Crescent Jewelry Company, we could make some money.

Testimony of Joseph Savan, for Defendant.

JOSEPH SAVAN, a witness called on behalf of the defendant, being duly sworn, testified:

My address is 274 Washington, my age is thirty-five, my business at the present time, merchant; jewelry merchant, in Portland, Oregon. I know Mr. Paul Harbaugh, the General Novelty Company and Mr. Holsman and Mr. Flatow here.

I had a verbal agreement with regard to profit sharing of the business carried on by these parties just mentioned, at which date I can't say. It was some where in 1920, but I don't just recollect any particular dates. At that time I was receiving a ten per cent commission. When we came to this agreement I agreed to take seven and one-half per cent of the profits of the pool—that is of the pooling profits, which at that time was altogether, that is,

(Testimony of Joseph Savan.)

for the Crescent Jewelry Company, the Keystone [118] Jewelry Company, The General Novelty Company and the I. Holsman Company. There was no partnership arrangement between any of these parties but simply an interest in the profits, and there was a settlement between us occasionally as to those parties if we needed the money. As it happened I didn't draw it, but it remained in the business. I was entitled to draw it when I chose. There was to be an accounting between us whenever we wanted.

Cross-examination.

There was an accounting when I bought out the Keystone Jewelry Company in March, 1921.

I have known Isadore Holsman about ten to twelve years and first entered his employ seven years ago when he was in the wholesale business in the Morgan building and continued to work for him until 1921 with the exception of about a month. The last place of business that I conducted for him, prior to buying him out was the Keystone Jewelry Company with which I was connected up to March 1916. I think it is five years at that time; it is still the Keystone, of course.

I was manager of the store and received a salary and a commission. I was drawing different salaries at different times; thirty-five to fifty dollars a week.

The Keystone Jewelry Company was an assumed name and the sole owner of the Keystone Jewelry

(Testimony of Joseph Savan.)

Company was at that time I. Holsman, and that situation existed until I purchased the entire stock, which was in March, 1921.

I think that prior to the time I purchased that store and at a time when Mr. Holsman was the sole owner of the store, I likewise filed a certificate stating that I was the sole owner, because Mr. Holsman was in the jobbing business and the jobbers will not sell to a jobber if he is interested in a retail store. To overcome that we had to show that the stores were not belonging to Mr. I. Holsman. [119]

**Testimony of Paul Harbaugh, in His Own Behalf
(Recalled—Cross-examination).**

PAUL HARBAUGH resumes the stand.

Cross-examination (Continued).

I know Mr. Flatow was paid three hundred dollars in cash and I believe that it is part of an item appearing on page 11 of the journal being plant expenses \$1569.49. I am positive that that was part of that because the amount is fixed in my mind. I know that he made—that our expenses for that month was exceptionally large because Mr. Flatow and myself took a trip in that month and that is the way I fix it.

Plant expense is all expense outside of commissions paid. In April the plant expense was \$696.51, and in May \$1596.49, the nine hundred dollars difference being accounted for in part by Mr. Flatow's trip and the trip that I took and the fact that we

(Testimony of Paul Harbaugh.)

were making—our salesman, Mr. Rubenstein, was continually on the road at that time, we had to make a number of short trips to take care of these ticket vendors that were not working.

**Testimony of Sam Flatow, for Defendant (Recalled
—Cross-examination).**

SAM FLATOW, recalled as a witness, testified on cross-examination.

We have nothing to do with any of the other stores now. We have each bought a store and thus when I bought the store from Holsman that settled the pooling agreement.

I don't remember what profits were allotted to Mr. Harbaugh. In fact, I don't remember what was allotted to myself, because we each had the privilege at any time, if we needed any money, to write a check for it ourselves and that was dropped off at the end of the year, or whenever the accounting was made.

Mr. Holsman wanted to retire from business and he made the proposition to each of the boys to buy a store off of him. I was manager of the Crescent Jewelry Company, Mr. Savan the Keystone Jewelry Company and Mr. Harbaugh has got his store on [120] Third Street. Mr. Holsman wanted to get out of business so he sold out the other stores, one to Mr. Harbaugh, one to Mr. Savan and to me he had nothing to sell because he had nothing to sell. Our lease was about up, it had to run from March to October and we could not get much satis-

(Testimony of Sam Flatow.)

faction whether we could get a new lease or not, so it was no use Mr. Holsman trying to sell to me, so we had a proposition then I should get half of the profits. Besides I was drawing a salary, I think fifty dollars a week, until we could find if we could get a lease, and Mr. Holsman didn't interest himself to get a lease, so I got out, and Mr. Swerland had leased the floor to the Knight Drug store and I went after them to get a space. I got a store—an agreement that I would get a space. It wasn't decided then whether I would get on Fifth Street or the space I did get. About two months previous to the time my lease expired Mr. Holsman didn't know I was getting a lease, and he came in one day and he said, "How much will you give me for the place, for the stock?" I said, "I will give you five thousand cash." He said, "Give it to me." He said, "If you get a lease I will sell you the fixtures." I figured in case I didn't get a lease I had still two months to sell out the stock and it was a good buy because there was about \$9,400.00 of stock there and I figured we could run a sale in those two months and still make a little money on it, but as it turned out I got a lease and then I turned around and bought the fixtures for four thousand dollars.

Mr. Harbaugh did not submit any profits made by the General Novelty Company because there wasn't any separate statement from any one of the stores. I think it was one statement of the whole thing. We could not tell from that who made the

(Testimony of Sam Flatow.)

profits, whether it was Keystone Jewelry Company, Crescent Jewelry Company, General Novelty Company or Holsman. I looked upon Mr. Harbaugh as the representative of the General Novelty Company and he was a party to the profits of the other stores and I think he was [121] consulted when this pool was dissolved by mutual arrangement last March.

Testimony of Joseph Savan, for Defendant (Recalled—Cross-examination).

JOSEPH SAVAN, recalled as a witness, testified on cross-examination.

I never dealt with Harbaugh as manager of the Novelty Company when I entered into this pooling agreement.

The MASTER.—If it should appear that the other claimants other than Harbaugh make no claim for compensation for loss of profits, are counsel then interested in the matter of the interior of their business arrangements among themselves? In other words, we have a number of defendants here. Now, then, if Mr. Holsman and I. Holsman Company and these other defendants waive any right in the profits, or any claim to profits, is it of particular importance to you to develop that somebody else might have been interested in this business at that time?

All of the petitioners have offered Mr. Harbaugh upon the stand, representing all of them. Mr. Harbaugh testifies that he is the only person inter-

(Testimony of Joseph Savan.)

ested in that business, that has any right to any part of the profits. I think they would be estopped to claim that anybody else did have any right to them.

Mr. GEISLER.—That is the position I want to take, that all parties are knowingly acquiescing, as it were, in Mr. Harbaugh's assertion here as to ownership of that business in the General Novelty Company. I merely make that statement to simplify the procedure, because I take it that the only interest the Court has is to determine that the right party gets the damages which may be ascertained had been occasioned by the wrongful injunction. I am here and make a statement on account of them all and bind them all according to the decree of the Court and that will be the end of the proceeding as far as all of the defendants are concerned.

**Testimony of Paul Harbaugh, in His Own Behalf
(Recalled).**

PAUL HARBAUGH, recalled as a witness for further [122] examination, testified on redirect examination:

Police interference occurred from the very beginning, was spasmodic, and notwithstanding such interference I did the business which I have testified to prior to the time of my being enjoined. At the time I was enjoined I had not attempted to measure out the amount of the profits. I did know that

(Testimony of Paul Harbaugh.)

we had made profits but I made no attempt to learn the amount.

In explanation with regard to this cash-book which has been spoken of as a book, I meant sheets, record sheets. Similar to the salesmen's record sheets in which all receipts were entered on the cash record sheets and also all expenditures. Those sheets were kept under my supervision and I checked up the amount of cash on hand to see if it corresponded with the balance shown on the sheets. Those sheets were preserved. I last saw them at the time I left Holsman's employ, about March, 1921. They were left in his office in a desk and subsequently that desk, amongst all other things in his office, and a lot of things in the basement of the Crescent Jewelry Company, were taken down to Olsen & Roe Warehouse and actually dumped into a room there. All mixed up in great disorder. I had nothing to do with the moving of those things but I have gone to that storage room two or three days ago and moved everything out of that room and went through everything that I could see that partook of the nature of a paper or document and I found these index cards which is Defendant's Exhibit 3. And also found some of these photographs which are the only books or records of the General Novelty Company that I found. The original orders were in the custody of Mrs. Johnson, who was Holsman's secretary or bookkeeper. I found those night before last. [123]

(Testimony of Paul Harbaugh.)

Redirect Examination.

I will explain to the Court the nature of my business as compared with the business Mr. Dwyer was conducting. He was conducting a business with boxes same as mine, putting out same sort of merchandise in practically the same way. I have had occasion to examine the kind of merchandise he was putting out. They were similar, different assortments, in most instances the same. The class of merchandise we were putting out made a difference in loss of business or getting of business only in that the better the merchandise the more business we could expect to do. The candies, jewelry and other merchandise which he put out were not the same, they were similar—no two assortments the same, all similar as to character and value; same is true of those of Mr. Dwyer.

The decline of business was caused by inability to use the box that we had previously used which did not compare in value with the old box. I had means of supplying all the trade I could get for my boxes.

I have examined the box here and determined that the box which I put out from February 25 to March 24, 1919 inclusive, is the original box marked Defendant's Exhibit 2 in the District Court. From February 25 to March 24 inclusive we put out 74 boxes. The return from the boxes was approximately \$8,737. I have the figures only for the total cost of the merchandise in those 74 boxes that I put out during this period. We put out a

(Testimony of Paul Harbaugh.)

total of 74 boxes bringing volume returns of \$6,465.-54; the cost of merchandise put out with those boxes merchandise \$3,232.75, commissions paid salesmen \$969.85, other expenses \$458.80, making a total of costs of 4661.40, leaving net profit of \$1,804.14.

Cross-examination.

The net profits of \$1,805.14 covers orders received and boxes sent out but does not mean that the estimate of returns [124] received included cash received during that period. The actual receipts in cash for boxes put out during that month and cash also received during same period \$2,803.75 and the expense during that period totaled \$2,243.45, leaving net profit during period of month \$560.30. These figures given here are based on salesmen's record sheets which were written by Mrs. Minsky in most cases. These entries were made as the receipts came in and in cash sheet at the same time.

The original entry of the receipt of that money was first placed in the salesmen's cash sheet. For example, these salesmen record sheets, being Defendant's Exhibit 2, reads as follows: "February 24, E. A. Blaesing, Salem, Oregon," and the pencil notation of \$23.85. The date there is the date of shipment and that entry was made some time on or after February 24th. The entry of cash received was placed in cash-book.

When the order was shipped out there was an entry made in salesmen record sheets and an entry made on the card.

(Testimony of Paul Harbaugh.)

Now, as to these expenses and cost of merchandise. When merchandise was ordered from Holzman and received from him the entry would be made in a journal.

On summary sheet, Defendant's Exhibit 10 the first item designated net returns from salesmen means moneys actually received from boxes and merchandise and includes expenses in putting them out, overhead expenses, is without the overhead expenses deducted, and amounts to \$11,266.00.

That figure \$11,266.00, does not mean that I actually received that amount of money during that period. The fact of the matter is that I only received, as shown by the ledger, page 35, the actual cash received during that period was \$4,738.00, from February 10 to March 28 inclusive, the balance to make up the Eleven and so forth was received during the balance of the year at different times. But the total moneys actually received from February 10 to December 31, was \$21,476.27. [125]

According to the ledger the total amount of merchandise sales from February 10 to December 31 amounted to \$32,281.22. This discrepancy of \$10,000 in the money received is due to the fact that we made sales other than through these boxes.

Goods sold outright included cameras and stick pins and other articles which we sold to various persons, Mr. Lavine and others. Goods sold by these devices are shown in record sheets.

The total of the cost of merchandise amounted to \$11,131.14 and on page 130 of ledger, which is

(Testimony of Paul Harbaugh.)

the ledger sheet showing amount of merchandise purchased during the year, the amount \$1,870.56 represents amount of merchandise purchased during that year, whereas the summary shows amount of merchandise sold during that year as \$11,266.00.

“Commissions paid” total \$1,788.75 and “other expenses” of \$5,717.53 or grand total exclusive of cost of merchandise, or \$7,506.28. These figures of commission paid and all other expenses must cover all expense in the operation of that business outside of cost of merchandise. These figures all appear in the ledger and there could not be any difference in the amounts of the ledger, so far as expense and commissions are concerned. Now, I call your attention to item of expense road, page 20, which shows that during the year 1919 \$4,468.23 was paid for road expense. The grand total commissions paid \$1,788.75. That last amount also includes traveling expenses of salesmen on salary and not on commission, previously referred to. The road expense and plant expense would cover all expenses whether commission basis or salary basis.

Page 10 shows “expense plant” total \$6,464.07, and “expense road” totals \$4,468.23, making a total of \$10,932.30 for expense in connection with these devices. This total ought to appear in the summary. The grand total is \$7,506.28, a difference of some three thousand dollars. [126]

Mr. GOLDSTEIN.—I offer these certified copies

(Testimony of Paul Harbaugh.)

of assumed business name certificates of Flatow, Savan and Harbaugh in evidence.

Thereupon the certificates were accepted in evidence and marked Plaintiff's Exhibit "C," "D," "E," respectively.

I got my store from Mr. Holsman in February, 1921. My store is located at 121 Third Street and is a jewelry store. I had an understanding that would make me owner of one of Holsman's stores, I believe about February, 1920. I was to take over store of Crown Jewelry Company, and filed a certificate later.

I took over store—bought store from Mr. Holsman—he was to receive 50 per cent net profits. On February, 1921, we ended that relationship.

Prior to February, 1921, I perhaps, filed certificate of assumed business name of Crown Jewelry Company, claiming to be sole owner, but Mr. Holsman was to receive 50 per cent and one of my salesmen was to get 10 per cent.

I paid \$2,500 or \$3,000 to Mr. Holsman at that time but am not paying him any of the profits since February, 1921, when I bought out his 50 per cent.

"Question. Do you remember the testimony of Mr. Savan, that while employed by Mr. Holsman he filed a certificate of assumed business name claiming to be the owner of a jewelry store, when in fact I. Holsman was the owner?

Answer. Yes.

Question. You also heard testimony of Mr.

(Testimony of Paul Harbaugh.)

Flatow claiming to be the owner when the truth was that Mr. Holsman was the owner?

Answer. Yes.

Question. Do you know when they filed those certificates?

Answer. No, I don't remember.

Question. You filed a certificate likewise about the [127] same time?

Answer. I suppose so.

Question. Don't you know?

Answer. I filed one but I don't know whether it was the same time or not.

Question. For the purpose of refreshing your recollection I hand you these certified copies of assumed business name certificates of Flatow, Savan and yourself and ask you if this refreshes your recollection as to the time when those certificates were signed and before whom the acknowledgment was taken and the time when they were filed?

Answer. They speak for themselves.

Question. Did you all appear before the notary at the same time?

Answer. Ben Lavine knows all the signatures and came out and fixed it up.

Question. Did you go to his office or did he come to yours?

A. He came to my office.

Question. Were Flatow and Savan present in your office and all three signatures taken at the same time?

Answer. Possibly about the same time."

(Testimony of Paul Harbaugh.)

Further Redirect Examination.

The last time I saw the original cash sheets they were in a desk in Mr. Holsman's office in the Phoenix Building, about February, 1921. I last saw the original invoices for merchandise bought from Mr. Holsman at the same time, and the express books in which original entries were made. I have since gone to the warehouse where Mr. Holsman has all his things stored and went through everything but I couldn't find them.

Recross-examination.

Mr. Holsman owns the round boxes designated as Defendant's Exhibit No. 7, now, I turned them all over to him at the time of [128] this pool. I believe they were originally paid for by Mr. Holsman and he was paid by me because I didn't have the money, this was subsequent to March 27 after injunction had been taken. Mr. Holsman could get credit on these and I couldn't.

(Questions by the MASTER.)

None of us received any cash, we received credit when this pool arrangement was made. I received between three thousand and fifty-five hundred in credit on Mr. Holsman's books. Mr. Holsman never gave me any other credits or gave me any money. He paid me a salary, for services rendered, it had nothing to do with pool itself. There were considerations involved that I was to receive 10 per cent interest in all of his business. I went in that pool with Mr. Holsman owing me between \$3,000 and \$5,000 and I received 10 per cent of all

(Testimony of Paul Harbaugh.)

business that was done during time pool was in effect and for year 1919 we pooled profits I received as my share for that period somewhere between \$3,000 and \$5,500, nearer the latter amount, but no cash credit.

I did receive interest in three other stores when I took over the Crown Jewelry Company. I gave Mr. Holsman notes, the consideration being \$2,500 and my other interest in his business I had interest in Keystone Jewelry Company, I sacrificed that. In taking over Crown Jewelry Company I assigned all my other interests and also paid him \$2,500 cash.

I had a verbal agreement with Mr. Holsman to pool the damages which might be received in damages due to the injunction. We were all pooling all our interest, various interests included, and each would have share agreed upon. I made no assignment in writing of interest of these damages to Mr. Holsman nor to Mr. Flatow. These damages were to be collected by me and distributed *pro rata* according to agreement. [129]

Testimony of Mrs. Winifred Sullivan Minsky, for Defendant.

MRS. WINIFRED SULLIVAN MINSKY was sworn as a witness examined and testified, on direct examination:

I live in Seattle, Washington. My name in 1919, beginning of that year was Winifred Sullivan, and

(Testimony of Mrs. Winifred Sullivan Minsky.)
was engaged in the beginning of the year 1919 as a bookkeeper for the General Novelty Company, and had practically all charge of the accounts of the business, which are marked Defendant's Exhibit 2 in this hearing, and I recollect having seen these sheets fastened together.

They seem to be my handwriting except these three numbers and address under heading of M. Schultz; this is Mr. Harbaugh's writing (referring to three names entered in pencil on bottom of page headed M. Schultz) several others here under the original entries are mine.

We had blank forms which the agents would take on the road with them, which they filled with number of assortment and amount they would wish and send them back in to me and I would copy that on the card under the name of the purchaser, city, state and date and afterwards put them on these sheets, dates they were placed and the dates receipts were returned to me.

When this order came in of W. N. Crouch dated February 25th, 1919, signed by P. R. Enlow, agent, it was the first document on which I knew of the matter, and the notations which I made in that particular case were on this card also, Defendant's Exhibit 9 at this hearing. I then wrote on the sheet and then checked it here.

The card was just a duplicate record, we had the card and we had the sheet.

When I wrote down here with it was delivered from and I would write it on the sheet and then I

(Testimony of Mrs. Winifred Sullivan Minsky.)
would check on the card so as to know I had already entered it on the sheet, and the card went into this card index from there, this Defendant's Exhibit 3. [130]

These cards were arranged according to the location of the dealer, according to city and state. As the amounts came in from this particular transaction of W. N. Crouch, they were entered by me on this card here and the amount entered here paid in full \$95.00. That appears on the sheet opposite to the one I just referred to, the left-hand sheet being identified by the name Paul Enloe. The source of my information, that that particular deal had been paid for was by receiving the check from which is made an entry immediately from that check or cash receipt on this paper marked Defendant's Exhibit 2 before the Master. I then made the entry in the journal.

We had a cash sheet where we entered everything that came in every day. I entered these items with respect to the W. N. Crouch sale on that cash sheet and then finally entries were made from this cash receipt into the journal and from the journal it was entered into the ledger. That was done at the end of every month. The amounts received from these different dealers who had these boxes were made direct to me and were entered on these sheets, defendant's exhibits before the Master, and I observed the same procedure with respect to every order I received.

In the accounts of Paul Enloe the entries on the

(Testimony of Mrs. Winifred Sullivan Minsky.)
first and second sheets in my handwriting and every place where there is a different handwriting are as follows:

All these in ink on the sheet headed Paul Enloe are in my handwriting. The pencil writing is Mr. Harbaugh's. In the next account, Ben Levin, with the exception of the pencil figures on the first page of Ben Levin's account at the extreme right-hand, all the entries are in my handwriting. The next one is "Office." These are the orders that came into the office, and as the orders came in they were filled the same as the others and written up on the card and through the books the same as the other orders. In some cases they were renewals and in some original orders. All this [131] handwriting is mine with the exception of the figures on the right-hand column and this one address, "Raymond"—that is Mr. Harbaugh's writing. In the second two sheets marked "Office" the two addresses are in Mr. Harbaugh's handwriting, and the figures in the right-hand column of the first sheet are his, the rest is mine. On the third sheet marked "Office" the writing is mine with the exception of the figures on the right-hand column. On the fourth sheet the writing is mine with the exception of the figures in the right-hand column and with the exception of the address "Hood River." Except the name "L. S. Lindsay August 12" on the fifth sheet and the figures in the right-hand column the writing is mine, and the same for the sixth sheet.

(Testimony of Mrs. Winifred Sullivan Minsky.)

That takes in all the sheets headed "Office." The account of E. D. Gallahear is in my handwriting.

The account of Ernst Du Bussion is in my handwriting with the exception of one figure here in the right-hand column that is in pencil.

The account of George Leby, with the exception of the figures in the right-hand column it is mine. The amount of O. M. Babcock is my handwriting with the exception of the figures in the right-hand column. The account of Joseph Schnitzer is in my handwriting with the exception of the figures in the right-hand column. The account of M. Schulz is my handwriting with the exception of the three dates, February 11, March 1st and March 5th, A. B. Dawston, J. J. Granger, and Buckley & Delco with the addresses; they are in Mr. Harbaugh's handwriting. The year is not here, but I know, it was 1919.

The account of Ben Peckman is in my handwriting with the exception of one figure in the right-hand column. The account of E. Grubenstein is in my handwriting.

The money I paid out each day from the express receipts was under cash paid out and we kept a sheet for that, petty cash sheet. The express receipts, would be receipts by the express [132] company of receiving certain orders to be sent out.

Sometimes we would send three or four orders out at a time and they were paid and the amount marked on the petty cash sheet and the receipts we kept and filed away. By looking up these pages I

(Testimony of Mrs. Winifred Sullivan Minsky.)
will be able to tell in each instance that the shipment was made as such on these records to the parties at their addresses as given of a certain assortment at a certain price, and so on.

When the commissions were paid to the different salesmen it was noted in the column headed "commission" to that man's account. I kept account of all money that came into the office of the General Novelty Company. The final postings of the amounts that I received in all the books were entered on the cards and in the journal also. I kept correct account of the expenses incurred in the office. The expenses paid out every day I entered on the petty cash sheet and they were entered at the end of the month in the journal and then in the ledger. The expenses paid out I put into the petty cash sheet then into the journal and in the ledger. I received my instructions in the business from Mr. Harbaugh.

Cross-examination.

The books of account or records I kept for the General Novelty Company consisted of the cards, the commission sheets or record sheets referring to Defendant's Exhibit 2, and the journal and the ledger, and the petty cash account. There was a check-book in the office for a while.

The entries were made on the same day as indicated by the dates and were made on the cards and then on to the record sheets.

The reason March 18th appears subsequent to April 22, in the account of Paul Enloe, Defendant's

(Testimony of Mrs. Winifred Sullivan Minsky.)

Exhibit 2, and being alongside the name Blaesing and Crouch is because Mr. Enloe was [133] on the road then and perhaps I did not get the order in until that date. This was in my hands before this one and still I would put it down March 18th because that was the day he sold it; that was the day he took the order.

As long as I had it on the card why it would not make any difference if it did not get checked on to the sheet. I may have written it three or four days later.

After an order is received and the shipment made there is no way of knowing how long it would take before the merchandise would be disposed of because sometimes they went off fast and other times slow.

I do not know if the injunction was in at that time; if the injunction was in at that time we did not ship that vender, Defendant's Exhibit 2.

I wrote letters to the dealers to turn in the venders after the injunction. I wrote the people to return the boxes as soon as they finished the merchandise, as soon as it run off. It took different times to run off one of these assortments, sometimes as long as a month, but it would not often take longer than a month.

It was always whenever I sent out an assortment whatsoever I would write to them and tell them as soon as it was run off to return the vender to us at our expense.

I believe I wrote letters after the injunction was

(Testimony of Mrs. Winifred Sullivan Minsky.)

served and told them to send in the venders and what was left, I am not positive. I can't recall if I did or not. I have a hazy recollection of something to that effect. We could not use that vender any more after the injunction was served. To send in the venders and the boards. Some sent some little in and some ignored the letters. Some sent neither the venders nor the boards and there is no record here showing what merchandise was returned.

I gave Flatow money in payment of his account or for some purpose \$300 in money and charged it up to Road Expense. It [134] was in the early spring, I think. The first entry I made of that payment was on the petty cash sheet, the money that was paid out like.

I left the office on January 22, 1920, and entered his employ about the latter part of January, 1919.

I made the entries in the ledger. Mr. Harbaugh usually told me how to enter them.

(Examination by the MASTER.)

Referring to these sheets, Defendant's Exhibit 2, before the Master, they were made in the usual course of business, and I kept these sheets while I worked there in the usual course of business.

Generally speaking, the entries were made as of the date they appear there, April 2d and April 22d and so on; they were put there the day we received the money.

These sheets or any part of them were not made by me from my independent records, for the pur-

(Testimony of Mrs. Winifred Sullivan Minsky.)
pose of this suit or some other purpose, at or about the time I left the company, for this is the same book we had when we started to work there in February.

I had never kept books before. But I know the records here shown of amounts received, commissions paid, and so forth, that appear upon these sheets are true and correct accounts. That money was actually received and the commissions were actually paid at or on or about the date that they bear.

None of these venders, known as Defendant's Exhibit 2 in the District Court, were sent out after the issuance of the injunction.

We sent out the round or circular venders. I don't remember just when we sent them out first, but after the injunction we did not sent out any of the others. We just sent out these. [135]

Resuming Cross-examination.

Mr. Holsman had nothing whatever to do with the General Novelty Company when I worked there. I know definitely he had not because I knew Mr. Holsman very well and I know that I would know if he had had anything to do with this company, and he talked to me about his business matters lots of times.

I also know because I know that Mr. Harbaugh was the one that started the company and was the one that owned the company.

I account for the fact that in the I. Holsman account up to the time I left we had paid to Mr.

(Testimony of Mrs. Winifred Sullivan Minsky.)

Holsman \$5741.65 more than we owed him, more than we had received merchandise for, in that I believe Mr. Harbaugh borrowed some money from Mr. Holsman with which probably to start the venture.

He told me he was going to borrow some money from Mr. Holsman to get out a new vending machine. Mr. Harbaugh told me he was going to borrow some money from Mr. Holsman for the purpose of getting out another vending machine after the injunction.

Redirect Examination.

In the account of Paul Enloe the names on the sheet stating the delivery of the outfits, the boxes and merchandise, is, in some instances, opposite also the name and the date noted when the cash was received on that particular deal. There was an attempt made in the keeping of the cash receipts to try to keep the name of the party from whom the cash was received opposite the same name showing the output of the box.

We tried to keep where we placed the vender and when we received the cash right opposite on the next page. Sometimes we did and sometimes didn't, but we tried to keep it that way. When we placed the vender with E. F. Blaesing, which was January 23d, \$85, and on April 3d the next amount, and right opposite we tried to put when it was paid for.

[136]

That was the first paper on which I made my entry. I tried to be as careful as possible, making

(Testimony of Mrs. Winifred Sullivan Minsky.)
my entries in each instance from the cash sheet. I was ill for a time, while working for Mr. Harbaugh. Some of the entries were made by Mr. Harbaugh for me while I was ill and some I made myself after I returned to work.

Referring to the entries on page 101 of the ledger, headed "Holsman, I. & Co." I really don't know of my own knowledge what these entries represent, so I can truthfully say that I do not know what all the items posted in this book mean. I might have known at the time but I cannot recall writing it now. I have seen these items before. They were made February 12, 15th and 28th.

**Testimony of Paul Harbaugh, in His Own Behalf
(Recalled—Further Redirect Examination).**

Mr. HARBAUGH, on further redirect examination, testified:

I will explain my relationship with Mr. Holsman and how the payments were made. These payments were made according to the pool that I have referred to. Before that I received ten per cent of all the profits of the several businesses referred to, and the understanding was that was not only for the year 1919 but for the future years, and I received considerably more than I put in. I received not only the profits from the previous dates but also for the future. In all the concerns. I realized more money out of the pool than I would have out of the General Novelty Company.

(Testimony of Paul Harbaugh.)

I found my summary of total expenses was considerably less than shown on the ledger, Defendant's Exhibit 10, and that was due to the fact that I did not include all the expenses for the dates after the injunction was issued, merely computing the summary of commissions I took 15 per cent of the sums of money upon which a commission was to be paid, when in fact there were additional expenses, such as traveling expenses, etc., which I did not take [137] into account. That constitutes an error, that was all subsequent to the injunction. In other words, after the injunction and not before, and the figures should have been \$2,282.95, which would show a corresponding expense for the 45-day period, giving a figure of \$1,712.21, whereas in my summary I have shown an expense of \$1,978.19, an amount in excess rather than below that shown in the ledger.

In figuring the estimated business that I did during the period from February 24th to, approximately, the date of the injunction, in other words, the month preceding the injunction, I derived the figures from the salesmen's record sheets and from the ledger, the expense of carrying on the business.

On page 101 of the ledger, the account of I. Holsman & Co., shows balance December 31, 1919, and February 9 and February 10, 1920. The first one December 31st, shows a balance due me from I. Holsman & Co. The other items show payments to Mr. Holsman, I. Holsman & Co.

(Testimony of Paul Harbaugh.)

I never borrow any money from Mr. Holsman. These are payments to Mr. Holsman. She stated I talked about borrowing from him which she probably got from the fact that we were talking about getting credit for the merchandise.

This box, Defendant's Exhibit No. 2 in the District Court, is covered by a patent, and that is the patent which was introduced in the District Court. I am the owner of that patent and no one else has an interest in that patent.

Recross-examination.

I did not at any time turn over to Mr. Holsman all my interest in the General Novelty Company but pooled the profits of the General Novelty Company with his other businesses.

The profits that the General Novelty Company had made would be approximately \$5,747 that I had overpaid Holsman and I [138] also pooled any damages that I might receive from this case. Also there were a few accounts that had not been collected and that might be collected thereafter, small accounts.

Testimony of J. F. Dwyer, for Defendant.

Mr. DWYER, called as a witness by defendant, was sworn and testified on direct examination.

I am the plaintiff in this case.

In the trial in the court below I testified, and also mentioned in my complaint about the bringing of a suit against R. H. Enloe & Company, the suit being

(Testimony of J. F. Dwyer.)

based upon an alleged infringement of my patent.

The suit went to decree, being Case No. 8251, by consent of the defendant, the case being entitled "Joseph F. Dwyer versus R. H. Enloe & Company," and there was an agreement entered into which formed a part of the decree of record in that case.

I got damages out of that suit but I don't remember how much. I think this agreement here was the settlement of the previous infringement.

The document marked W. D. Phillips, Third and Main Streets, Vancouver, Washington, and opposite his name, \$105, [139] represents a shipment to this party, W. D. Phillips on consignment, to the amount of \$105, with the word "about" there, as you will note. Out of the box and the merchandise \$40.00 may be profit, but you must understand it entirely depends upon the gambling feature as to whether the box wins or loses. \$105 is the entire amount if every last ticket is sold.

\$105 would represent 3,000 tickets if sold at five cents each, which would total \$150, and thirty per cent to the dealer would amount to \$45.00, therefore the amount the document here uses "about" being always placed before it, is \$105. If every last ticket was sold it would be \$105.00, and each of these amounts assume such a transaction.

In that respect transactions as they are put on this agreement of the amount and value of the box shipped, the deductions made by the dealer, and the gross profit which would be turned into me providing every ticket had been sold, agree with the com-

(Testimony of J. F. Dwyer.)

putation made by Mr. Harbaugh on like transactions. And that is the same method as used by Mr. Harbaugh.

If they do not sell all the merchandise, the merchandise that is not sold, the tickets not sold plus five cents for each ticket that is sold, less the commissions on each is the amount returned.

Cross-examination.

There is no certainty as to the amounts received. The shipment is made and 3,000 tickets go with every one of these instances we have discussed. The tickets sell at five cents each bring in \$150 if they are all sold. As a matter of fact, they are not all sold, because there is one feature prize or maybe two, and just as soon as the big prizes are gone the boxes are returned, they cannot sell any more and credit is given for the unsold merchandise and tickets and a new outfit shipped to the customer. That is one point. Another point is continually the amount of police interference. In my business we had that always to contend with, [140] so I brought an action to decide whether these devices were gambling devices or not, whether it was contrary to the statutes. I brought an injunction against the city of Seattle; it was allowed in the Superior Court and the city took it up on appeal and the Supreme Court declared it a gambling device, and that was the end of all the business we had ever had with the silent salesman.

It also depends upon the sporting instincts of the people who play this device. It also depends upon

(Testimony of J. F. Dwyer.)

the business condition of the vicinity and the business getting ability of the dealer where this device is placed. It also depends upon the general business conditions, whether the town is so called open, or closed, whether the fellows in the town have to patronize pool-halls and card-rooms or not, and where the device is placed in the town. In other words whether they have the money to take a chance.

There is no certainty about the time it takes to get the returns from the sale. In our business that is entirely indefinite we figure our business entirely on the time when we get the receipts, dependent entirely on the conditions explained. We do not consider any business done when the goods are shipped. We figure the business done when we get the money because that is the only time we can tell how much we are going to receive. When the Supreme Court of the State of Washington declared this device a gambling device that ended my business. And the Silent Salesman is in all respects similar to the device used by the defendant in this case, Exhibit No. 2. That is the one I sought to enjoin. In the State of Oregon we used the words "Bargain Boxes" for the title of the device and in the State of Washington the name of the device is the silent salesman.

Redirect Examination.

The Supreme Court decision was long after the trial of this case, and up to the time of the trial of this case, October, [141] 1920, I was still in business just as usual as theretofore, and I was subject

(Testimony of J. F. Dwyer.)

to the same police interference. Notwithstanding police and other conditions I did quite a profitable business. When I had interference in one place by the police I immediately went into another. I had a large territory to go into and taking it as a whole the business was a profitable one.

Recross-examination.

The profits were not susceptible of determination in advance with any reasonable degree of certainty.

Respectfully submitted,

T. J. GEISLER,

Attorney for Defendant, Harbaugh. [142]

(Title.)

Stipulation Re Statement of Evidence.

It is hereby stipulated by the parties that the foregoing statement of evidence submitted on the part of defendant on appeal of the above-entitled cause, and duly lodged in the office of the Clerk of this Court, is correct, complete and properly prepared, and may be approved by the Court as a part of the record in said cause for the purpose of appeal.

Dated: Nov. 2, 1922.

E. L. SKEEL,

ROBERTS & SKEEL,

Attorneys for Plaintiff.

T. J. GEISLER,

Attorney for Defendants. [143]

(Title.)

Order Approving Statement of Evidence.

Pursuant to the stipulation of the parties in the above-entitled cause on appeal:

The statement of the evidence (and all the exhibits therewith included) lodged by appellant, Paul C. Harbaugh, in this cause of appeal, is hereby approved as true, complete and properly prepared, and the same shall constitute a part of the record in this cause for the purpose of said appeal.

Dated: Nov. 6, 1922.

R. S. BEAN,
District Judge. [144]

On November 21, 1922, an order was filed to send the original exhibits of this cause to the Court of Appeals.

(Title.)

Order to Send to the United States Circuit Court of Appeals for the Ninth Circuit the Original Exhibits.

On the application of T. J. Geisler, of counsel for the above-named Paul Harbaugh, defendant

It is hereby ORDERED that the original models and exhibits introduced by either party at the trial of this cause in the court, or before the Master thereof, be sent by the Clerk of this Court to the Marshal of the Circuit Court of Appeals for the

Ninth Circuit, pursuant to Rule 34 of the latter court.

Dated: Nov. 21, 1922.

R. S. BEAN,
Judge. [145]

United States of America,
District of Oregon,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from two to one hundred and forty-five, inclusive, constitute the transcript of record on appeal in the case in said court, wherein Joseph F. Dwyer is plaintiff and appellee and I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, General Novelty Co., John Doe, Richard Roe and Robert Roe are defendants, and the said defendant Paul Harbaugh is appellant; that said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and is a true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record attached

thereto, the original citation on appeal filed in said cause.

I further certify that the cost of the foregoing transcript is \$42.85, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 28th day of November, 1922.

[Seal]

G. H. MARSH,
Clerk. [146]

[Endorsed]: No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Paul Harbaugh, Appellant, vs. Joseph F. Dwyer, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 4, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE
RUBENSTEIN, PAUL C. HARBAUGH,
BEN LEVIN, JANE DOE SULLIVAN,
GENERAL NOVELTY CO., JOHN DOE,
and RICHARD ROE,

Defendants.

**Order Extending Time to and Including October
15, 1922, to File Record and Docket Cause.**

On the application of T. J. Geisler, of counsel for defendant, Paul Harbaugh, it is ordered that the defendants be, and are hereby allowed to and including the 15th day of October, 1922, in which to file a transcript of the record herein, with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated the 9th day of Sept., 1922.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 8369. In the District Court of the United States for the District of Oregon. Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul C. Harbaugh, Ben Levin, Jane Doe Sullivan, General

Novelty Co., John Doe, and Richard Roe, Defendants. Order Extending Time for Filing Transcript of Record on Appeal.

No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including October 15, 1922, to File Record and Docket Cause. Filed Sept. 11, 1922. F. D. Monckton, Clerk. Refiled Dec. 4, 1922. F. D. Monckton, Clerk.

In the United States District Court for the District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE
RUBENSTEIN, PAUL C. HARBAUGH,
BEN LEVIN, JANE DOE SULLIVAN,
GENERAL NOVELTY CO., JOHN DOE,
and RICHARD ROE,

Defendants.

Stipulation and Order Extending Time to and Including November 15, 1922, to File Record and Docket Cause.

It is hereby stipulated that the defendant's time to file a transcript of record herein with the United States Circuit Court of Appeals for the Ninth Cir-

cuit be extended to and including the 15th day of November, 1922.

Dated: October 13, 1922.

ROBERTS & SKEEL,
FRANK A. STEELE,
Attorneys for Plaintiff.
T. J. GEISLER,
Attorney for Defendant.

ORDER

On the foregoing stipulation, it is on application of T. J. Geisler, of counsel for defendant Paul Harbaugh,—

ORDERED that the defendants be, and are hereby allowed to and including the 15th day of November, 1922, in which to file a transcript of the record herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 13, 1922.

R. S. BEAN,
Judge.

[Endorsed]: No. 8369. In the United States District Court for the District of Oregon Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul C. Harbaugh, Ben Levin, and Jane Doe Sullivan, General Novelty Co., John Doe, and Richard Roe, Defendants. Order Extending Time for Filing Transcript of Record on Appeal.

No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including

November 15, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 4, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the
District of Oregon.

November 13, 1922.

JOSEPH F. DWYER,

vs.

I. HOLSMAN et al.

**Order Extending Time to and Including December
1, 1922, to File Record and Docket Cause.**

Now at this day, for good cause shown, it is

ORDERED, that the time for filing the transcript of record for appeal in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including December 1, 1922.

R. S. BEAN,
Judge.

[Endorsed]: No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 1, 1922, to File Record and Docket Cause. Filed Dec. 1, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the
District of Oregon.

No. E—8369.

November 28, 1922.

I. HOLSMAN

vs.

PAUL HARBAUGH et al.

**Order Extending Time to and Including December
9, 1922, to File Record and Docket Cause.**

Now at this day, for good cause shown, it is
ORDERED, that the time for filing the transcript
of record in this cause and docketing the same in
the United States Circuit Court of Appeals for the
Ninth Circuit be, and the same is hereby, extended
to and including December 9, 1922.

R. S. BEAN,
Judge.

[Endorsed]: No. 3946. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time to
and Including December 9, 1922, to File Record and
Docket Cause. Filed Dec. 4, 1922. F. D. Monck-
ton, Clerk.

No. 3946

United States Circuit Court of Appeals for the Ninth Circuit

PAUL HARBROUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

APPELLANT'S BRIEF.

*Upon Appeal from the United States District Court for
the District of Oregon.*

T. J. GEISLER,
Counsel for Appellant.

FILED

JAN 24 1923

**F. D. MONCKTON,
CLERK**

United States Circuit Court of Appeals for the Ninth Circuit

PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

APPELLANT'S BRIEF.

*Upon Appeal from the United States District Court for
the District of Oregon.*

A Concise Statement of the Question Involved

This is an appeal from the decree of the District Court for Oregon (Hon. Robert S. Bean, D. J.) setting aside the report of the standing Master of that court, awarding appellant Harbaugh \$13,650. Such sum, the Master held, appellant Harbaugh was entitled to recover, since that, at the very least, represented the sum which appellee Dwyer had unlawfully appropriated

from Harbaugh's business, by eliminating him, his only competitor, by means of a preliminary injunction, wrongfully obtained by Dwyer in a suit for the alleged infringement of his patent, and unfair competition.

As appears from the opinion of Judge Bean (Trans. 56): The Master found that *appellee Dwyer and appellant Harbaugh* "had a practical monopoly of this business," and since Dwyer "was permitted by reason of the injunction to continue the business a portion of the profits made by him during such time belonged to the defendant (Harbaugh), because the plaintiff (Dwyer) became a trustee therefor ex maleficio."

Dwyer excepted to the Master's report, urging that since the business both parties were engaged in as competitors, must be classified as gambling, therefore the court should not interfere; no damages should be assessed against Dwyer because of the wrongful injunction, and in short Harbaugh must be denied any relief. And this notwithstanding the parties were engaged in said business as *competitors* and *not* as partners.

As the Master found:

"Dwyer was not a partner of Harbaugh, but a *competitor*. By his wrongful use of the court's injunction there have come into his hands funds which belong to the defendant. His possession of the same resulted *not from the agreement* on Harbaugh's part, but *against his wishes*, and *by reason of an order of the court which Dwyer himself ob-*

tained." (Trans. 46.) " * * * The defendant's claim for damages to his business had been abandoned, and he now claims an accounting for the profits which he says the plaintiff obtained, which in fact belong to him."

However, *the real question involved is not predicated directly upon any question of recovery of damages, but upon the duty of Dwyer to make restitution of the profits of which he illegally possessed himself by the wrongful injunction; and the duty of a court of justice to compel such restitution, when the parties are still before it, and it still has control of the subject matter.*

Note in this connection that *Dwyer admits his own transgressions of the law, but seeks to shelter himself, by the plea of illegality, in order that he may keep the profits he illegally obtained by his wrongful injunction.*

In this connection note further, as will be pointed out, that *Dwyer did not deny that, under his wrongful injunction he appropriated some profits in the business from Harbaugh; also testified that the business was profitable.* (Trans. 182.)

He said, on the stand:

"Notwithstanding police and other conditions *I did quite a profitable business.* When I had interference in one place by the police I immediately went into another. I had a large territory to go into, and taking it as a whole the business was a profitable one."

Dwyer offered absolutely no assistance to the Master in determining the amount of profits he thus appropriated from Harbaugh, but contented himself wholly with relying on the insufficiency of the proofs presented by Harbaugh, showing the amount of the loss in his business, after the issuance of the wrongful injunction, and in this way proving indirectly the probable gain of Dwyer.

For as the Master found, (Trans. 42) :

“The testimony clearly shows that the plaintiff and defendants *had a practical monopoly* of the business in question, and that *by the issuance of the injunction there flowed to the plaintiff all the profits of the business.*” And (Trans. 51) inasmuch “as the plaintiff became trustee for the defendant, the burden was cast upon him by competent testimony to separate those profits which were rightfully his from those which belonged to defendant. This the plaintiff has not done.”

“We have two people enjoying a monopoly of the business, each claiming under separate patents. The plaintiff, by use of a restraining order unlawfully bars the defendant, his competitor, from the field, and thereby obtains profits which otherwise would have been the defendant’s.” (Trans. 44.)

Dwyer also raised the objection before the Master (see report Trans. 42) :

“1. That the imposition of damages is discretionary,” to which the Master answered that he had not considered that objection “for two reasons.” First, that the court’s order to him directs him to assess damages if any, sustained, and second, *the evidence does not disclose that degree of good faith on the part of the plaintiff in obtaining the injunction to warrant the exercise by the court of any discretionary power.*”

Judge Bean considered it necessary to consider only, of the numerous exceptions filed by Dwyer, his plea of illegality. ¹(Opinion, Trans. 56.)

These matters are further brought out in detail in the following:

Brief Statement of the Facts in the Case

At the time the infringement suit was brought, Dwyer and Harbaugh were engaged, as competitors, in the business of selling merchandise by ticket vending devices. Each purchaser of a ticket would always get some merchandise, and besides the chance to get something of much greater value, as might appear on the next ticket following which the purchaser also had the right to purchase. And it was this element of chance which as Judge Bean concluded, condemned the business as illegal, in disposing of the infringement suit. But that finding was *merely incidental to the main finding* in the case, which was that *there was absolutely no infringement by the Harbaugh device* upon the Dwyer patent; Dwyer in trying to make Harbaugh an in-

fringer attempted to reintroduce, by construction, the very claims denied him in the Patent Office. (See opinion, Trans. 26.)

The *charge of unfair competition Dwyer abandoned* altogether. Not a word of evidence was given in support of it.

The suit was brought against Harbaugh and others in March, 1919, on a patent granted to Dwyer June 4, 1918, No. 1,268,222 for a so-called Device for Dispensing Tickets. The charges of the Bill were infringement and unfair competition. (As to the latter see paragraphs of Bill VIII to X, Trans. 7.) Furthermore, the Bill, in order to *impress* the court that it was dealing with an *adjudicated* patent, alleged in paragraph XII that the patent had been the "subject of adjudication" in a prior suit, entitled Dwyer v. Enloe, No. 8251, *tho the fact was there had been no such adjudication*. The disposal of such prior case was wholly by consent. (Trans. 179; and see certified copy of the consent decree.)

On March 27, 1919, appellee Dwyer obtained an order granting him a preliminary injunction restraining appellant Harbaugh, and the other defendants in said suit, from further using Harbaugh's Ticket Dispensing Device.

It appears from said preliminary injunction order that on the hearing of the motion therefor the vending boxes used by the parties, respectively, were introduced before District Judge Wolverton, who heard the mo-

tion. (Trans. 11.) Thus the character of said devices was established by these exhibits on the hearing of said motion.

Furthermore, the plaintiff's own patent clearly shows the direct, and apparently *only purpose and use for which his device was intended*. For note Fig. 5 of the drawing forming part of said Dwyer patent, which shows a fragment of ribbon of the tickets to be used with the Dwyer device, the fragment showing five tickets, three of which are shown in full and they read consecutively, from the bottom to the top (which would be the way the ribbon of tickets would be pulled out from the device), "5c collar button when sold by the Silent Salesman."—"5c collar button and Camera when sold by the Silent Salesman."—"5c collar button when sold by the Silent Salesman." And see also line 51, p. 2 of the specification of the Dwyer patent.

It is, therefore, submitted that the remark of Judge Bean in his opinion filed on setting aside of the Master's Report (Ib. 55) that the parties were "disposed apparently to keep the fact that these devices were of a gambling character in the background," was founded on a mistaken assumption as far as appellant Harbaugh is concerned. It is rather to be assumed that the court was persuaded by Dwyer, on the motion, to pass up that question until the trial of the whole case on the merits. Such assumption is supported by the contention of Dwyer on the trial of his infringement suit that his device was *not* of a gambling character, and that it had been so decided by a court. (Trans. 92.) It would

have been to Harbaugh's advantage if he could have persuaded the court, at the time the injunction motion came up, that these devices, and their only uses, were for purposes prohibited by the gambling statutes; for then the injunction probably would have been denied, and he would have been left on an equal footing with Dwyer in the field. Note also in this connection how Harbaugh tried to bring out the character of the Dwyer device at the trial of the infringement suit, but was prevented by the objections of Dwyer's counsel. '(Trans. 74.) Harbough frankly testified about his own device. (Ib. 91.)

The preliminary injunction provided (Trans. 12):

"(3) This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patents in suit.

(4) Plaintiff's surety bond in the sum of Twenty-five Hundred '(\$2500.00) Dollars, filed herein at the time of the temporary restraining order is hereby discharged."

Thus showing that Judge Wolverton deemed it necessary to increase the bond of Dwyer from \$2,500 to \$10,000.

In compliance with said order of March 27, 1919, Dwyer deposited and there still remains with the Clerk of the said United States District Court, United States Liberty Bonds in the sum of \$10,000.00.

The defendant's answer denied the validity of said alleged patent, also its infringement. (Trans. 13.) Also any unfair competition by defendants; in that regard alleging that whatever resemblance there is in the outward appearance of the devices, is due solely "to physical and structural requirements common to said devices." (Trans. 23.) The answer further alleged that "instead of the defendants or either of them being guilty of infringement, or unfair competition, in the premises whatsoever, the plaintiff is seeking to bring about an *unfair restraint on Harbaugh's business* and the sale of his merchandise." (Ib.)

And by supplemental answer appellant Harbaugh set up the granting to him on March 11, 1920, of letters patent No. 1,339,823, for Ticket Dispensing Device, on an application filed in the U. S. Patent Office Feb. 13, 1919. (Trans. 25.)

The infringement case went to trial in October, 1919, before ~~the~~ District Judge Bean. On the trial of said suit Dwyer testified (Trans. 72) referring to his ticket vendors:

"I have up to now sold thousands of them. I would say that I have *done a business* * * * *of between \$250,000 and \$500,000* * * * This

represents the value of the merchandise sold thru those Silent Salesmen. (This was the name by which his devices were known.) Those sales were made in Oregon, California, Washington, Idaho, Montana and Alaska—were sold pretty generally thruout those states. *My customers here in Portland had considerable trouble. This was the one point we were not able to do a great deal of business, because after we got started, they got placed upon the trade here, first came Enloe and his partner in this business located in the Phoenix Building, the same building that the defendants are located in, also the same floor, the fifth floor * * ** *My customers here were interfered with thru this imitating device, not alone imitating the device itself, but imitating the method of sales and the style of merchandise that was used, and in many cases was put out by the retailer dealers as the same thing that I had had before, the difference being the price, the cut price given him by the defendants in this case, the General Novelty Company. Outside of this territory we had had scarcely any trouble with infringement.”* (Trans. 72, 73.)

On cross examination appellee Dwyer testified (Ib. 73):

“I applied for my patent thru Frank Warren, an attorney in Seattle. He advised me that the art relating to ticket vending machines was pretty well covered. I knew that it was an old idea to put tickets in the form of a roll or package and

feed them thru slots. (The file wrapper of the Patent Office, of plaintiff's patent was put in evidence as Defendant's Exhibit A.) I read the Patent Office letter of March 27, 1918, and particularly the paragraph beginning with the words 'Springsteen, Aug. 29, 1919,' reading 'No. 632,070, 211/37,' which shows finger holes to enable the operator to grasp the ticket. Walsh shows tension device * * * Whitaker, et al, June 11, 1872, No. 127,722, shows a pivoted dog L for preventing ticket being pushed back into the receptacle."

Reynolds, a patent attorney and expert, called as a witness on behalf of Dwyer, testified on cross examination (Ib. 85):

"I have examined the Shoup No. 286,493, Springsteen 632,070, and Whitaker, 127,722, patents. All of these patents show a receptable or container for the mechanism employed and an opening thru which the ticket may be projected. I have also seen and examined the patent of C. L. Davis, on Ticket Case or Holder, granted May 31, 1892, No. 476,005, and the patent to Oehring, on Ticket Holder, granted Dec. 6, 1910, No. 978,052, both showing * * * a roll and a pack of tickets, as existing at a date prior to the Dwyer patent. * * * The Dwyer patent specifically states that the partitions are fixed to the removable back wall. (Trans. 86.) The defendant's device has no back wall which is fixedly fastened to the partitions, that is, the back wall I mean a portion of the

outer casing. That is possibly what is meant by a removable back wall in claim 1 of the same patent. The next element in the same claim provides 'guide members having slots that fit over said shaft and co-operate with said slots in the end walls of said receptacle to form a support for said shafts. That has reference merely to the little parts that are cut away in the partition walls of plaintiff's device, so as to adapt them to be inserted over the shaft which carries the rolls of paper. The defendant's device having no partitions, necessarily has no slots in partitions of this kind. The Whitaker patent of 1872, looking at Fig. 5, provides a tension device of some kind which, in one position, will function to prevent the ribbon being drawn back. The Shoup patent 286,493 of 1883 has a glass plate covering the exposed part of the ribbon and looking at Fig. 2, it also has a roll acting upon the ticket strip to prevent their turning backwards.

In the patent granted to Mr. Dwyer there was contained a specific element in each claim a removable side referring to the back wall of the casing. There is nothing in the Harbaugh box which is similar with regard to partitions as the construction shown in the Dwyer patent."

Goldberg, another witness called by Dwyer in the trial of his infringement suit—an attorney at law and consulting engineer specializing in patent practice—testified on cross examination (Trans. 88), that the Harbaugh device had no removable wall which had par-

titions affixed to it and which is an element in the language of the claim of the Dwyer patent.

On the trial of the infringement case as already mentioned appellant Harbaugh specifically tried to point^{out} to the court the character of the device patented to Dwyer, and use thereof in his business. But the questions directed to this end were opposed by Dwyer's counsel on the ground of immateriality, and the objection was sustained (Trans. 74), until towards the close of the trial, when similar questions were put by the court during the examination of Harbaugh on his own behalf. (Trans. 91.)

But even then counsel for Dwyer sought to dispel the conclusion of the court that the devices used by the parties were of a gambling nature, counsel stating: "I wish to say this on that question, that this device has been held not to be a lottery or gambling device of any kind, if that is the question in the court's mind."

Court: It occurs to me now that inasmuch as it has that feature, whether it is such a character that a court of equity would care to enjoin someone infringing it.

Dwyer's counsel: "I have authorities on that subject. I would also like to say that this apparatus itself has been specifically held by the court not to be a lottery or gambling device." (Ib. 92.)

On Dec. 20, 1920, Judge Bean rendered his opinion for the dismissal of the infringement suit (Trans. 25) holding, in substance, that the *Harbaugh device did not*

contain the elements specified in the Dwyer claims. That the claims of the Dwyer patent as allowed can not be construed to cover what was rejected by the Patent Office. That the Dwyer patent, if valid at all, is a very narrow one, therefore he is not entitled to any monopoly of analagous means, and that the Harbaugh device was not an infringement of the Dwyer patent. Incidentally, the Court in its opinion mentioned that if the Dwyer device is not a lottery or gambling device it borders closely thereon. It is the element of chance in its operation which gives it value, and hence it was doubtful whether a court of equity, on grounds of public policy, should assume to protect him in a monopoly thereof.

The defendants in the infringement suit thereupon, on Dec. 20, 1920, entered a decree, dismissing the suit with cost to defendants.

On Jan. 14, 1921, appellant Harbaugh filed a petition praying the correction of said decree in conformity with Rules 72 and 19 of the Equity Rules, by adding thereto the provision that the temporary injunction, wrongfully granted to plaintiff Dwyer, in said suit, was vacated and set aside, and reserving the matter of ascertaining the damages sustained by the defendants, or either thereof, because of said wrongful temporary injunction, for further proceedings in the District Court. (Trans. 28-32.)

On Jan. 15, 1921, defendants filed a further petition (Trans. 33), among other facts alleging (Ib. 37)

“That by reason of the plaintiff, thru *his misrepresentations of the facts to this court and concealing from the court the true facts concerning his said alleged patent, and the claims thereof, and the scope of such claims, the plaintiff unlawfully and unequitably succeeded in producing for himself a substantially exclusive monopoly, and made large sums of money, the amount of which defendants can not state at this time, but thereafter would endeavor to establish, and which money so made because of plaintiff’s unlawful monopoly represented to a large extent the profits which defendant Harbaugh would have made if his rights had not been interfered with by said wrongful temporary injunction, and which profits the defendant Harbaugh would have made in competition with the plaintiff in those places and localities where both were operating their merchandise selling devices and selling their goods prior to the commencement of this suit.*” And the defendants prayed the court “to ascertain the damages which they and each of them had incurred in said infringement suit by reason of said wrongful preliminary injunction, and that the plaintiff be required to pay the sum so found to the defendants, in accordance with the directions of this court, and that the security, to-wit, the Liberty Bonds of the par value of \$10,000.00 on deposit with the Clerk of the Court be applied in satisfaction of the damages awarded by the court in the premises, and *that the defendants and each of them may have such other and further relief as may be just.*”

On Jan. 17, 1921, an Order was entered in said infringement suit correcting said decree of Dec. 20, 1920,

in that it specifically provided that the said injunction order of March 27, 1919, was vacated and the injunction thereunder dissolved. And it "further ordered that the matter of ascertaining what, if any damages, the defendants, or either of them, had sustained by said injunction order be referred to Robert F. Maguire, Esq., the standing Master of the court, to ascertain the facts and report to the court his finding in the premises." This order further provided that the Liberty Bonds deposited with the Clerk be retained in his custody subject to the further Order and Decree of the court herein. (Trans. 39.)

An appeal was taken by the plaintiff Dwyer from said decree of Jan. 20, 1920, and the order of Jan. 17, 1921, correcting the same and directing said reference, but said appeal was later dismissed because of Dwyer failing to print the record in compliance with Rule 23 of this court. (Trans 41.)

The matter of ascertaining the damages sustained by the defendants and each of them by said wrongful injunction was then brought to hearing before the standing Master.

On such hearing before the Master the proof on behalf of appellant showed:

There was no claim of damages on behalf of any of the other defendants. Appellant Harbaugh is the only one injured by the injunction; and counsel for all the defendants stated at the hearing be-

fore the Master (Trans. 157), that all parties knowingly acquiesced in Harbaugh's assertion here of ownership of the business of the General Novelty Company. That counsel was making that statement on behalf of all defendants to simplify the question before the court, in determining who was the right party to get restitution of that which was taken by Dwyer by the wrongful injunction.

Harbaugh, in his own behalf, testified (Trans. 93):

"I am twenty-eight years old. I reside in Portland, Oregon, and am in retail jewelry business. In the early part of 1919 I operated the General Novelty Company. I was the owner; merely assumed that name."

Plaintiff's Exhibit 2 in the District Court was the device enjoined (Trans. 85). This is covered by a patent of which Harbaugh is the exclusive owner. (Trans. 178.)

"I was engaged in the business of selling merchandise in which I used this. * * *

"I made two hundred of these boxes. The merchandise sold by these boxes consisted of quite a large assortment, for the most part mounted on a pad, something on this order. Attached to the pictures, *Defendant's Exhibit 1* (Trans. 94) is a list showing the articles in that assortment. * * *

"There was an assortment of the merchandise delivered with each box. The assortment and the

tickets in the box corresponded with each other. I made the selection of articles for the assortment. The value of the assortment varied between thirty and fifty dollars. The box cost \$2.50. I sold the assortment of merchandise to the dealer for \$150, less thirty per cent commission usually. These assortments were placed on consignment with the dealers and he was allowed thirty per cent for such sales as he made. In placing these boxes with the dealers the salesmen called on them and either placed them in person, or took orders to be shipped.

* * * We had what we called a salesman's record, kept on sheets on which each assortment that we placed was entered. These are the sheets. They are in the handwriting of Winnifred Sullivan. She was my bookkeeper. Her name is now Mrs. Morris Minsky and lives in Seattle, Washington."

(This bookkeeper was called in corroboration. See Trans. 166.)

(Trans. 95.) "I instituted the system for keeping account of these transactions. The entries were made by the bookkeeper under my direction. By refreshing my memory from these record sheets I can testify as to each transaction I had with these boxes or merchandise. These record sheets relate to the year 1919. * * *

"As each assortment was shipped out, the entry was made on these record sheets, and also entered on a card. The entry on this sheet in most cases was

made from the original order. I have such original orders here. They are all contained in these files.

* * *

(Trans. 96.) "I have personal knowledge that every one of these entries of goods shipped were in fact made, and the goods put in the hands of these particular purchasers. I know that from my own personal knowledge and observation. These sheets are segregated by the salesmen's names. If an order was taken by Mr. Enloe, when it was shipped the entry was made upon his sheet, and the same with the other salesmen. The opposite side is a record of receipt of money from the dealer applying to those assortments. I know that the sums of money received and recorded here were received from these individual dealers whose names appear here. * * *

(Trans. 98.) "The expenses connected with the making of these sales outside of the commissions paid to the dealers; explained in detail were maintaining an office, salaries of bookkeeper and assistants who made up the assortments, express charges, stationery and such items as that, and the commissions paid to the salesmen, which were 15% of the amount received. We kept a list of all moneys paid out for expenses and at the end of the month entered them in the journal.

"When an assortment was shipped out a record was entered on the salesmen's commission sheets and also on a card which was placed on a card index. * * *

"Cards marked Defendant's Exhibit 3. (Trans. 99.)

"I got the information for making these entries on the commission record and on these cards, from the original order or memoranda of shipment. These original orders are in this box here.

"The original orders in the box received as Defendant's Exhibit 4. (Trans. 99.)

"I know of my own knowledge as to most of these orders in this box marked Exhibit 4 being filled. I am able to tell which of those orders had been filled by looking at the salesmen's record. I know of my own knowledge that each one of these orders which is specified here on Defendant's Exhibit 2 was filled. There were cases where they were returned later without being used, but those returned were noted on the record by the explanation 'Did not use,' or 'returned' or some such, written opposite to the particular name of the dealer and in alignment to the dealer's name.

"I know the net profits that my business realized from the boxes put out prior to the date of the preliminary injunction approximately. I ascertain that amount by deducting from the receipts all expenses, which left the net profit. I have a record of the receipts, but the expenses have to be estimated, in a number of instances. The receipts were entered in the salesmen's record sheets, also in the journal."

This journal was received in evidence as showing the receipts from these boxes and the merchandise sold, and marked *Defendant's Exhibit 5*. (Trans. 100.)

"The expenses consisted in a number of items. First, I estimated the cost of the merchandise that was sold at 50 per cent of the receipts as a maximum; it would actually be considerably less than that. Then there were commissions to salesmen. They are arrived at from the information on the salesmen's record sheets. When paid there would be an entry of the amount and to whom paid on the commission's record sheets. They were also entered in the journal at the end of the month; the total was entered in the journal.

"All other expenses were grouped. Rent and light and office expense, such as bookkeeper's salary and workmen's salaries, stationery and the like. Record was kept of them and the total entered in the journal at the end of the month. I have only the total for each month, so in arriving at the estimated expenses for the period of forty-five days I took seventy-five per cent of the total amount for the two months, which gave me the approximate expense, as near as it could be arrived at for the forty-five days. * * *

Ledger received in evidence and marked *Defendant's Exhibit 6*. (Trans 101.)

(Trans. 102.) "There were three thousand collar buttons to each assortment. These cost two

dollars a thousand, thus six dollars for each assortment. In addition to the other specified items the real fact was that each assortment only used approximately five hundred collar buttons, because the customers didn't take them.

"In figuring we cannot say how many less there were, so there will have to be added to \$36.30, six dollars for collar buttons. That would make the total cost \$42.30.

"I made up the first assortment and then had the workmen copy it. I personally am acquainted with all prices of the goods and am able to testify positively at this time as to my own knowledge of these assortments within a limit of variation. In making up my estimates I placed the cost for each assortment at not over fifty dollars. The actual cost was less in each instance. * * *

(Trans. 117.) "*The volume of business I did for the preceding forty-five days, I mean preceding being enjoined, was a total of \$11,266.00. That was the gross receipts after deducting the dealers' commission of thirty per cent but without deducting the salesman's commissions. In order to arrive at the profit it would be necessary to deduct the cost of the merchandise. That was \$5,655.00. I will explain how we arrived at that. By merely deducting fifty per cent of the total receipts, that is the amount of the cost of the merchandise. That would be the maximum and would usually be considerably more than the actual cost, but that is the*

way we figured it. Then the commissions paid, \$1,213.19 to salesmen. That is exact. All other expense \$765.00. That was arrived at by taking the total expenses for February and March and using seventy-five per cent of that total to cover the forty-five day period. *My net profits for the period of forty-five days was \$3,664.81.*

"We had been threatened with injunction for some time, I don't know exactly for how long, and some time before being served with papers enjoining us, I had endeavored to make up another box that we could use in case we were enjoined from the use of the one we were then using. This is Exhibit 7, the round box.

"Being threatened with injunction affected my business. Letters were received by our customers. Some of the customers showed me the letters they had received. I saw two of these letters. I am not able to say as to by whom these letters were signed. I don't know where those letters are. I have made a search for them but have not been able to find them.

"To replace the enjoined boxes we made up a new box, which our attorneys advised us did not infringe on any patents, and we put that in use. I attempted to put out that new box in California in the vicinity of San Francisco, but had no success at all. I found the dealers were using Mr. Dwyer's box put out by that territory, and we could not get our box in at all. The objection of the dealers to

the use of our new box was, they did not like it as well as Mr. Dwyer's. The cost of these new boxes was five dollars each. I had two hundred made. I endeavored to continue my business after the injunction was served up to January, 1920. Then I discontinued trying to put out any boxes because it was unprofitable. We were not doing enough business to make it pay. Our receipts steadily dwindled, and we were operating at a loss.

"In some instances the merchants received these circular boxes and used them but there was a general disinclination to use them because of their bulk and other objections they had to them. I made a computation as to the way in which our business fell off after the injunction. It is included in Exhibit 10.

"In April our receipts dropped to \$2,684.56 and our net profits to \$470.29. In May the receipts from the business were \$4,239.83 and the net profits \$310.36.

"This exhibit is based upon my knowledge gathered from the books. Receipts from the business done in June \$1,620.27, net loss \$318.27. All these months were in 1919. Receipts from business done in July \$360.34 with a loss of \$172.64. Receipts from business done in August \$822.32, with a profit of \$133.75. Receipts from business done in September \$488.93 with a loss of \$29.69. In October, the receipts were \$555.44, net profits, \$75.66. In November the business done was \$248.58

with a net loss of \$43.67. In December the business done amounted to \$190.00 with a net loss of \$250.75. I have no figures for January, 1920. That is when we stopped putting these out.

“The restraining order was served on March 22d, 1919. * * *

(Trans. 159.) “I will explain to the Court the nature of my business as compared with the business Mr. Dwyer was conducting. He was conducting a business with boxes same as mine, putting out same sort of merchandise in practically the same way. I have had occasion to examine the kind of merchandise he put putting out. They were similar, different assortments, in most instances the same. The class of merchandise we were putting out made a difference in loss of business or getting of business only in that the better the merchandise the more business we could expect to do. The candies, jewelry and other merchandise which he put out were not the same, they were similar—no two assortments the same, all similar as to character and value; same is true of those of Mr. Dwyer.

“The decline of business was caused by inability to use the box we had previously used. * * * I had means of supplying all the trade I could get for my boxes.

“I have examined the box here and determined that the box which I put out from February 25 to

March 24, 1919, inclusive, is the original box marked (Plaintiff's) Exhibit 2 in the District Court. From February 25 to March 24, inclusive, we put out 74 boxes. The return from the boxes was approximately \$8,737. I have the figures only for the total cost of the merchandise in those 74 boxes that I put out during this period. We put out a total of 74 boxes bringing volume returns of \$6,465.54; the cost of merchandise put out with those boxes merchandise \$3,232.75, commissions paid salesmen \$969.85, other expenses \$458.00, making a total of costs of \$4,661.40, leaving net profit of \$1,804.14."

Witness Rubenstein, for Harbaugh, confirmed the latter's statement as to the manner in which the business was done by Harbaugh. (Trans. 103.) This witness also stated in detail *why Harbaugh's business fell off* after the injunction. (Trans. 106.)

"This box here, the round box, was not received with the same favor as the original box by the dealers. There was objection to it for several reasons. The first objection was that it was large, it would take up too much space; usually kept these boxes on a showcase or cigar case or somewhere in the front where they could be seen, in order to get the customers interested in playing it, and when we put the other one on they complained it was too large and was taking up too much space. That is one of the main reasons; bunglesome. The placing of the new box to my knowledge affected the sub-

sequent trade, after the injunction in this way, that they kept on telling why I didn't give them the old box, it was smaller box, less bulk. They could see all the numbers right in front of it. In lots of cases they would possibly pull on a certain number and after they had spent, say ten or fifteen tickets they would be pulling on, they would figure there must be a prize about due. By turning this large box they would lose the number they had been pulling on and they would not know whether it was the same one or not, and in that way it wasn't satisfactory. They claimed that the round box, Defendant's Exhibit 7, was used to mislead the customer.

"The business began to fall off. The customers wanted the other box back again, and eventually they drifted back to either that one or one similar to that. This one here I recognize, I used to see this box here a great deal; the Bargain Box. (Referring to the plaintiff's box marked Plaintiff's Exhibit 3 in the District Court.)

"They would replace our round box with those other boxes. And in a great many cases they told me they liked my merchandise better, the board which the merchandise was displayed on, but they didn't like to keep the box, Defendant's Exhibit 7, on the show case. * * * That was the only reason business fell off, the use of this box; not because of police interference."

Witness Flatox, for Harbaugh, also confirmed that the injunction and the restraint on Harbaugh from

using his first box (Plaintiff's Exhibit 2 in the District Court) was the direct and only cause of his loss of business. (Trans. 147.)

"I was in his employ and tried to put out some of the merchandise selling boxes for the General Novelty Company during a period within two or three months after the injunction. I took out the round, circular boxes, but the trip was an absolute failure. Altogether I made quite an extensive trip, starting here at Portland, and going to Spokane; from Spokane to Helena, Helena to Billings, Billings to Cheyenne, Wyoming, Cheyenne to Denver, Denver to Grand Junction, Colorado, and Salt Lake City, and then back to Portland again.

"They were a little bit too bulky, and they didn't like the style of the box. That was the biggest complaint, was that it took too much room on the counter; that was the biggest complaint. And there was a few other features they didn't like about it; for instance, most of them had seen other boxes and said they had the tickets right in front of them and this one here was in six different sections and had to keep turning the box around, and one party in particular I spoke to said it didn't work as good as this box here, the tickets used to get caught and jam."

Appellee Dwyer did not offer himself as a witness on his own behalf at all, but was called to the stand by appellant Harbaugh, and testified, in substance, that the

computations of his own business would "agree with the computations made by Mr. Harbaugh on like transactions." (Trans 179.)

On cross-examination by his own counsel Dwyer testified that the Superior Court of Seattle had held his device not to be prohibited by the statutes defining gambling in Washington, but on appeal to the Supreme Court, by the city of Seattle, his device was declared to be a gambling device.

On further redirect examination of Dwyer, on behalf of Harbaugh, he stated that *the Supreme Court decision was long after the trial* of his infringement suit. That *up to the date of the trial* of the latter *he was still in business as usual* "subject to the same police interference." Dwyer said: "*Notwithstanding police and other conditions I did quite a profitable business. When I had interference in one place by the police I immediately went into another. I had a large territory to go into and taking it as a whole the business was a profitable one.*" (Trans. 182.)

In this connection it is to be repeated that *on the trial of the infringement suit Dwyer testified* (Trans. 72) *that the business which he had done up to that time (Oct., 1920) was between \$250,000 and \$500,000.*

The contentions of Dwyer on the hearing before the Master appear from the Master's Report.

The Master found: (Trans. 45.)

“That the fact that the device is a gambling device does not bar the defendant Harbaugh from recovering any profits *which Dwyer obtained by reason of the restraining order*, and as to those profits Dwyer is in the position of *a trustee ex maleficio*.

“That the defendant Paul Harbaugh is the real party in interest in this suit and that there is no defect of parties. (Ib.)

“That there was no violation of the injunction by the defendant. (Ib. 49.)

Amount of Damages

(Ib.) The evidence shows that during the forty-five days immediately prior to the issuance of the injunction that the defendant was doing a large volume of business. From the boxes put in the hands of dealers during that period the defendant received the sum of \$11,256.00. Mr. Harbaugh testified that the merchandise sold with these boxes cost approximately \$50.00 a box, amounting to \$4,633.00; that the amount paid salesmen was \$1,213.19; that incidental expenses amount to \$765.00, making a total expense of \$7,611.19, and a net profit of \$3,644.81, or a daily profit of approximately \$80.99.

It may well be as contended by plaintiff's counsel that there was no absolute certainty that these profits

would continue in like amounts, but in all business the volume and profits fluctuate. If a generous allowance be made for fluctuations there can be no doubt that the defendant would have realized a profit of at least \$1,500.00 per month.

It is not necessary, however, for the Court to rest upon the figures given by the defendant, for the burden rests upon the plaintiff to account and show what portion of the profits he received were derived from the business which he took from the defendant by means of the restraining order.

The plaintiff admitted at the trial before Your Honor that the gross sales from his business for a period of thirty-six months ran from \$250,000. to \$500,000. His methods of operation were approximately the same as those of the defendant. It is not contended that the goods used by the plaintiff cost more than those used by the defendant, or that his costs of doing business were any greater. We have, therefore, satisfactory data from which to determine the net profits of the plaintiff, upon a basis of a minimum of \$250,000. He testifies that out of the gross returns of \$105.00 per box to him, \$40.00 of the same represented profits, and if this be a true statement, and there is no reason to suppose that the plaintiff overstated his gain, his average monthly sales would be \$6,944.00 and his average monthly net profits \$2,645.00. These figures have assumed the minimum amount of merchandise claimed to have been sold by the plaintiff. Of course, the profits would increase with the volume of sales, and if they reached the plaintiff's

maximum of \$500,000.00 the monthly profit would be \$5,290.00.

There is no testimony as to what proportion of these sums represent the profits which otherwise would have gone to the plaintiff. Inasmuch, however, as the Master has found that the plaintiff became trustee for the defendant the burden was cast upon plaintiff by competent testimony to separate those profits which were rightfully his from this which belonged to defendant. This the plaintiff has not done, and, upon the theory that the Master has adopted, any loss arising from this confusion of funds must fall upon the shoulders of the plaintiff.

Westinghouse Company vs. Wagner Company,
225 U. S. 604, 618.

Based upon the testimony of the defendant as to profits made during the time prior to the stoppage of his business by the Court's order and the admitted volume of business and profits made by the plaintiff and the failure of the plaintiff to properly account for those which belonged to the defendant, the Master makes the following findings:

That there came into the possession of the plaintiff by reason of the wrongful restraining order profits belong to defendant Harbaugh in the sum of \$1,500.00 per month. and that the total amount thereof during the pendency of the injunction and from the 27th of March, 1919, to the 1st day of January, 1920, at which date defendant ceased to do business, being nine months and

three days, is \$13,650.00, and that defendant is entitled to recover that amount with interest from date of final decree against the plaintiff.

The Master prays that his compensation in the premises may be fixed and that due order be made for its payment.

Appellee Dwyer thereupon filed *exceptions to the Master's Report* (Ib. 52) which may be summarized as follows:

(a) That appellant Harbaugh was not entitled to recover any damages because the device used by him was a gambling device.

(b) That the defendant Paul Harbaugh was not the real party in interest.

(c) That the Master erred in not finding that defendant had violated the injunction and was therefore precluded from recovering any damages.

(d) That the finding of the Master that there came into the possession of the plaintiff by reason of the wrongful restraining order profits belonging to the defendant Harbaugh is not sustained by the evidence.

(e) That the Master erred in not finding there was no tangible proof of loss of estimated profits.

That the Master erred in not finding that the profits claimed by the defendant were so remote contingent and speculative as to bar recovery of any alleged profits.

(f) That the recovery of the defendant in any event is limited to the amount of the bond.

The exceptions were argued before the District Court, the latter filed a memorandum opinion July 17, 1922, in which the court arrived at the conclusion that it was necessary to consider said exception "a" only, and with respect thereto held that the report of the Master should be set aside for the reasons already stated in the beginning of this brief.

A decree was then entered in said infringement July 17, 1922, setting aside the Master's Report, disallowing defendant's petition for damages, directing that the \$10,000.00 Liberty Bonds put up by Dwyer be returned to him, unless Harbaugh effected an appeal within thirty days by giving an approved bond in the sum of \$2,500, fixing the fees of the Master in Chancery at \$300.00, and requiring the appellant Harbaugh to pay this jointly with Dwyer.

An appeal was thereupon duly taken to this court based upon the errors pointed out in the following:

Specifications of the Errors Relied Upon

(Trans. 61)

I.

Because the District Court justified the illicit use by the plaintiff of the writ of injunction of this court to suppress the competitive business of defendant, on the ground that such business was illegal, notwithstanding

the plaintiff was engaged in the same business as a competitor of defendant, and profited directly by so suppressing the latter's competition.

II.

Because said decree is contrary to the principles of law, justice and equity governing the premises, and is particularly in violation of the principles which guarantees equal protection of the law to all persons, in that the District Court first interfered in the competitive business of the parties, and wrongfully enjoined said defendant from using his property in his business, thereby changing his position and condition in the premises, and enabling the plaintiff, by the illicit use of the process of this court, to make and take gains and profits from said defendant's business; and then the District Court abandoned defendant, and refused to require the plaintiff to comply with the conditions on which he obtained said illegal injunction, refusing to require him to restore to said defendant the gains and profits which he had so illegally taken from him.

III.

Because said decree is contrary to the principles of equity and justice, in that it permitted the plaintiff to profit by his own wrong in the premises, namely, to retain the gains and profits he made by illegally enjoining the defendant, his competitor, and thereby unlawfully diverting and appropriating the business, and profits of defendant's business to himself.

IV.

Because said decree is contrary to equity, and is unjust to defendant, in that it disregards, and fails to give effect to, the condition which was the price at which plaintiff obtained and accepted the temporary injunction granted him in this cause, and later found to be illegal, and refused to require the plaintiff to make restitution to defendant of that which he illegally took from him by said illegal injunction.

V.

Because said decree is contrary to the principles of equity and justice, in that the District Court, though still retaining control of the subject matter and the parties of this cause, refused to correct that which it had wrongfully caused to be done therein by its wrongful injunction, and refused to require the plaintiff to restore to said defendant the gains and profits which the plaintiff took from defendant's business, by illegally enjoining him.

VI.

Because the District Court erred in decreeing that no damages should be allowed said defendant for the injury he sustained by the wrongful injunction obtained by the plaintiff herein, notwithstanding the finding by the Master that the plaintiff illegally took gains and profits from defendant's business under said illegal injunction and in equity now holds such gains and profits as trustee maleficio for defendants.

VII.

Because the District Court erred in sustaining the plaintiff's exception to the Master's Report, also in setting aside and vacating said report and refusing to allow to defendant any damages notwithstanding the facts as found in this cause.

Argument and Authorities

The entire final decree of the District Court is contrary to equity and justice. The errors may be specifically summarized by the third and fifth assignments of errors:

"3. Because said decree is contrary to the principles of equity and justice, in that *it permitted the plaintiff to profit by his own wrong in the premises*, namely, to retain the gains and profits he made by illegally enjoining the defendant, his competitor, and thereby unlawfully diverting and appropriating the business, and profits of defendant's business to himself.

"5. Because said decree is contrary to the principles of equity and justice, in that the District Court, *tho still retaining control of the subject matter, and the parties of this cause, refused to correct that which it had wrongfully caused to be done therein by its wrongful injunction, and refused to require the plaintiff to restore to said defendant the gains and profits which the plaintiff took from*

defendant's business, by illegally enjoining him.”
(Trans. 62.)

To correct that which a court has wrongfully done by its process is one of the powers inherent in every court of justice so long as it retains control of the subject matter and the parties. *Arkadelphia Co. vs. St. Louis Ry. Co.*, 249 U. S. 134, 145.

It is more than a mere power; it is a duty founded on the principles of justice.

In *Northwestern Fuel Co. vs. Brock*, 139 U. S. 216, 219, cited in *Arkadelphia Co. vs. St. Louis Co.*, supra, the court said:

“The power is inherent in every court, while the subject matter of the controversy is in its custody, and the parties are before it to undo what it had no authority to do originally, and in which it therefore acted erroneously, and to restore as far as possible the parties to their former position.”

In the last mentioned case the court further said (P. 216):

“The right of restitution of what one has lost by the enforcement of a judgment subsequently revoked has been recognized in the law of England from a very early period * * * The same doctrine has been fully recognized by this court in *U. S. Bank vs. Bank of Washington* (31 U. S., 6 Peters, 817), stating, *on the reversal of a judgment*

*the law raises an obligation in the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost * * *."*

In effect *the promise made, and obligation assumed by Dwyer, as a condition for the injunction, was:— Let me do all the business and collect all the profits, and if it be found that Harbaugh was not infringing my rights, and I, therefore, was not entitled to restrain him, I will account to him, and pay him back all profits which I took from him.*

Dwyer does not deny that by means of his unlawful injunction he took some profits from Harbaugh; but refuses the prayer of Harbaugh for restitution by pleading the maxims of "leaving the parties where they are," because both guilty of transgressing the law and "coming into court with clean hands." In so doing, however, Dwyer confesses that he was the only party carrying on the illegal business pending the injunction; also confesses that he is by far the greater malefactor; for, in the case at bar there are two parties, both patentees, competitors, having a monopoly of the business which Dwyer says was illegal. And Dwyer used illicitly the solemn process of injunction for the sole and inequitable purpose of suppressing his competitor, thus diverting all the profits of the latter's business into his own pockets. In other words, Dwyer, by misrepresenting his patent, in effect caused the District Court, in issuing the wrongful injunction, unwittingly to hold Harbaugh bound while Dwyer took his property from him.

Dwyer's acts, both in law and equity are deemed fraudulent.

It is plain that the only purpose he had in bringing his suit was to practice the vice of *unfair competition* against Harbaugh; to eliminate the latter, his only competitor. *Dwyer's motive, therefore, was bad. His scheme, successfully carried out, was unfairly to appropriate Harbaugh's business. Unfair appropriation, by illegal court proceedings, is a species of unfair competition, condemned by the same principles as apply to the latter, and to be dealt with accordingly.*

"No arbitrary rule can be laid down as to what is or is not unfair competition." *Ludlow Valve Co. vs. Pittsburgh Mfg. Co.*, 166 Fed. 26, 29.

In unfair competition "equity does not concern itself with the means. The question is whether what was done is fraudulent, or has a tendency to promote fraud."

Bates Mfg. Co. vs. Bates Numbering Machine Co., 172 Fed. 892, 895.

Walter Baker vs. Slack, 130 Fed. 514.

Unfair competition "takes as many forms as the ingenuity of man can devise."

Manitowoc Co. vs. Milwaukee Malting Co., 119 Wis. 543, 546.

In *Racine Paper Goods Co. vs. Dittgen*, 171 Fed. 631, 633 (C. C. A. 7th), the defendant was adjudged

guilty of fraud and unfair competition by *pretending* that he had a broad patent, and in this way frightening off plaintiff's customers. The court said:

“* * * *If it is made to appear that under pretense (of protecting a patent right) he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of law obtaining in cases of unfair competition in trade; * * * when this is proven * * * fraud will be implied.*”

In the case of Atlas Co. vs. Cooper Co., 210 Fed. 347, 352, a suit to enjoin unfair methods of trade, the defendant had pretended to have a patent claim which would “stop the manufacture of every form of a practical imitation of closed crotch union suit.” The court remarked “The defendant has not in my judgment met the inferences legitimately to be drawn from its conduct thus disclosed.”

In the case at bar Dwyer threatened suit some time before he brought his infringement suit, in his effort to kill off Harbaugh's competitive trade.

In the introduction to Nims Law of Unfair Competition, page 2, it is stated:

“Unfair competition is not confined to acts directed against the owner of a trade-mark or trade

names, but exists wherever unfair means are used in trade rivalry. Equity looks not at what business the parties before the court are engaged in, but at the honesty or dishonesty of their acts. It is unfair to pass off one's goods as those of another
 * * * *but he who seeks to win trade by means fair or foul, is not limited to these methods*
 * * * *All acts done in business competition are either fair or fraudulent, equitable or inequitable, whether they relate to marks or not."*

Unfair competition is quite occasionally accomplished by the aid of the process of a court wrongfully obtained. As remarked by Judge Quarles in Commercial Acetylene Co. vs. Avery Co., 152 Fed. 642, 645, "Instances are not wanting where patentees make illicit use of the courts as instrumentalities of oppression."

If in the case at bar *Dwyer deliberately misrepresented the facts* concerning his patent in order to obtain his wrongful injunction, and thus eliminate Harbaugh as his competitor, he was clearly guilty of unfair competition, or what amounts to the same thing, *guilty of unfair appropriation* of defendant's business, as the court put it in *Marvel Co. vs. Pearl*, 133 Fed. 160, 162. That is, the purpose being "to prevent the exercise of the right of fair competition."

Dwyer knew that he had a very narrow patent. His attorney in his patent application had so advised him. Dwyer also knew that from proceedings in the Patent Office. (Trans. 73.)

On the motion for the preliminary injunction Dwyer took advantage of the similarity in outward appearance of the rival vending boxes, due to their physical and structural requirements. In appearance *Dwyer's own vending box simulated strikingly the device patented to Springsteen* Aug. 29, 1899, No. 632,070. Hence, the device in its general aspect was open to the public. And as far as the mechanical devices incorporated in these vending boxes are concerned, of course, everything in the prior art also belonged to the public at large. *Smith vs. Nicholls*, 21 Wall. (88 U. S.), ~~192~~ 112, 117

Dwyer does not claim that his wrongful acts in the premises were due to bad advice. He made no explanation whatever. The Master noted that the evidence failed to disclose good faith on the part of Dwyer in obtaining his injunction (Trans. 42).

Dwyer testified on the trial of the infringement suit that in the patent application he was guided by his patent attorney, Frank Warren of Seattle; (Ib. 75) but did not claim to be acting under his advice in the suit nor did he call that attorney as a witness; nor did he claim to act under the advice of his expert Reynolds.

Reynolds, apparently, did not see Dwyer's patent, nor its file-wrapper, until shortly before he testified in the infringement suit. (Ib. 76.) The testimony of this expert, in effect, was merely his view point of the application of the doctrine of equivalents. He admitted that the Harbaugh device did not embody those features specifically made elements in the claims of the Dwyer

patent. (Ib. 86.) He further admitted that the prior patents showed similar means as those embodied in the Dwyer construction. (Ib. 85.)

Dwyer tried to re-introduce into his patent, in effect, the very claims which had been rejected by the Patent Office and cancelled by him. '(Judge Bean's opinion, Trans. 26.)

In fact, as mentioned, the only similarity of the Harbaugh device to the Dwyer device was in physical requirements, and those structural features admitted to be well known in the prior art, and with regard to which the unallowable claims of Dwyer had been cancelled.

Dwyer evidently withheld his knowledge of the true status of his patent from Judge Wolverton on the motion for the wrongful injunction; and besides represented that his patent had been *adjudicated* in a prior suit, when in fact such was untrue; the prior decree being wholly by consent.

To pretend that a patent has been litigated and sustained, when as a matter of fact it has never been in real litigation—such pretended adjudication being asserted in order to gain an advantage thereby—is a species of fraud, or imposition on the court. Luten vs. Wilson Co., 263 Fed. 983, 985.

“Fraud has been defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another.”

"Fraud consists in any undue advantage taken of a party under circumstances which mislead, confuse or disturb the just results of his judgment and thus expose him to be the victim of the willful, the importunate and the cunning."

"Fraud is what is done in secret and where there is a concealment from a party in a matter which concerns his interest."

3 Words and Phrases, page 2943-4.

In order further to persuade the court to grant him a preliminary injunction, Dwyer coupled, in his Bill, with his charge of infringement, the charge that the acts of Harbaugh were unfair in the following particulars (Trans. 8):

"A. Unfair, fraudulent and unlawful use of ticket vending machines for selling collar buttons and other merchandise. B. Unfair, fraudulent and unlawful use of display boards upon which merchandise is displayed. C. Unfair, fraudulent and unlawful methods of procuring business. D. * * * intent to appropriate and unlawfully infringe upon plaintiff's rights, and to cause the public to be confused and deceived into purchasing the products of defendants * * * giving to defendants an unfair advantage and constituting unfair competition * * *."

And on the trial of the injunction suit Dwyer explained what he meant by his charges of unfair competition against Harbaugh:

“My customers here were interfered with thru this imitating device, not alone imitating the device itself, but *imitating the methods of sale and the style* of merchandise that was used, and in many cases put out by the retail dealer as the same thing he had had before, the difference being the price, *the cut price given by the defendants* in this case.”

Thus *Dwyer had unfair competition in mind when he brought the suit*. He was trying to do the very thing with which he wrongfully charged defendant Harbaugh.

But aside from any specific defining of Dwyer's unlawful conduct, the fact remains that he *did acquire*, by his wrongful injunction, and *now holds profits* which he *wrongfully* obtained, by means thereof, from the defendant's business. *The transaction is closed. The business is gone, and nothing that the court can now do will affect the accomplished facts.*

Dwyer does not now charge that Harbaugh did anything wrongful as against him. The only offense charged against Harbaugh in the transaction which is to render him an outcast from courts of justice, is, that he transgressed the gambling laws.

*A breach of duty to the State does not necessarily involve a breach of duty to the defendant and when it does not it is simply an irrelevant fact unless the law gives it relevancy in some express form. * * ** Hence the conclusion is irresistible that the plaintiff's violation of a penal statute can not be pleaded in defense

of a tort unless such violation is a contributing cause of the injury for which compensation is asked. * * * *The fact that the party injured was at the time violating the law does not put him out of the protection of the law.*

* * * The law should not absolve from responsibility the perpetrator of a *private wrong* solely because the injured party may have violated a penal law, which violation in no wise contributed towards his injury.

Hughes vs. Atlantic Steel Co., 136 Ga. 511; 36 L. R. A. (N. S. 547).

One party to an action when called upon to answer for the consequences of his own wrongful acts done to the other, cannot allege the *separate wrong* of the other, done not to himself, or his injury and not necessarily connected with or leading to or causing the wrongful act complained of.

1 Sutherland on Damages (4th Ed.), Par. 5, P. 19.

The principle is "that to deprive a party of redress because of his own illegal conduct the illegality must have contributed to the injury.

1 Cooley on Torts (3rd Ed.), P. 209.

The law relating to the observance of Sunday defines a duty of the citizen to the State, and to the State only. For a breach of this duty he is liable to the fine or penalty imposed by the statute and nothing more. *We should work a confusion of relations and render a*

very doubtful assistance to morality, if we should allow one offender against the laws to the injury of another to set up against the plaintiff that he too was a public offender."

Philadelphia Co. vs. Towboat Co., 23 How. (64 U. S.) 209, 218.

In Fuller v. Berger, 120 Fed. 274, 278 (C. C. A. 7th, 1903), the court said:

"Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular right asserted in his suit. If the defendant can do no more than show the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums."

This doctrine was approved in Board of Trade v. Kinsey Co., 130 Fed. 507, 513, decided by the same C. C. A.

In Mills vs. Industry Co., 230 Fed. 463, 464, the facts showed that the defendants had not only violated the law themselves, in the same manner as the plaintiff, but besides had wrongfully invaded his rights. The court, citing the case of Fuller vs. Berger, remarked:

"This is not a suit between persons in pari delicto, this is not a suit where the plaintiff and de-

fendant have been jointly interested in violation of the law."

In *Batemen v. Fargason*, 4 Fed. 32, 33, the court said: *The maxim "He who comes into equity must do so with clean hand" * * * only applies to the conduct of the party in respect to the particular transaction under consideration; for the court will not go outside the case for the purpose of examining the conduct of the plaintiff in other matters * * *. The wrong on which relief is refused must be to the defendant and not to a third party.* This case is cited to the same effect in *Chicago v. Union Stock Yards*, 164 Ill. 224.

The court might have refused to have anything to do with the transactions of the parties in the first instance, because of the character of the business in which they were engaged. No complaint could then have been made by either party.

The nature of the business, it would seem, was at least indicated to the court from the very beginning by Dwyer's own description of his device, and it's only use is given in the specification of his alleged patent. Also by the device as manufactured under his patent and produced in court. The court, however, in its discretion, granted Dwyer his preliminary injunction, at the same time imposing ample safeguards for the rights of Harbaugh, in case the injunction should prove wrongful. But after Dwyer had been found by the court to be an imposter, may it then desert Harbaugh, refuse

him any relief, adjudge his bond as worthless, and let Dwyer keep all his unlawful gains?

It seems unthinkable that a court of equity would announce such doctrine. It doubtless was not intended by the court below. Yet this, in effect, is the result of the disposition of this case in the court below.

There is no dispute of the doctrine, that courts will not permit the recovery of the loss of profits due to a tort committed against an illegal business, where it is not also shown that the wrong-doer directly profited by his acts. *But, when the person who committed the injury did directly profit then a wholly different question arises.*

As said in *Head v. Porter*, 70 Fed. 498—There is a marked difference between profits directly made by a wrongdoer, and damages such as are recoverable, for example, for libel, slander, diversion of a water course, and similar actions of tort, not resulting in direct gain to the wrong-doer. In the former case actual *direct* pecuniary benefits, capable of definite measurement *are* acquired by the wrong-doer; in the latter, the loss suffered by the injured party does *not* result in any direct pecuniary benefits to the wrong-doer.

The District Court concedes the principle that a tort-feasor can not be permitted to profit by his own wrong. The court said (Trans. 57) :

“It is true under some authorities, where parties have entered into illegal transactions, and it has

been consummated, and one has profits growing out of it belonging to the other party, that the court will interfere to compel the party holding the profits to account to its partner."

But this statement loses the real *force* of the principle involved. *Not a single case* was cited in the court below, nor has been found, where a tort-feasor, who directly profited by his tort, was permitted to retain his illegal gains. It is contrary to the principles of justice and equity.

In *Manchester R. R. v. Concord R. R.*, 20 Atlantic Reporter 383, the Supreme Court of New Hampshire said:

"The first plea avers that the contracts between the parties under which the defendant went into and retained the possession and management of the plaintiff's road for more than thirty years, were wholly beyond the corporate power of either party to make or to ratify, and that, therefore, the defendant should be hence dismissed with its costs and charges. In other words not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired, and be dismissed with costs, because it is not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith, and fair deal-

ing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to a transaction *ultra vires* simply, will be heard to allege its invalidity while retaining its fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make *restitution* to the other party whose money or property it has obtained through an unauthorized contract. * * * (386). It is true that in general, where parties are concerned in illegal agreements, or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity will not interpose to grant relief; but this is so *only* when the parties stand upon *equal* footing, for the doctrine everywhere running through books is that *relief will be granted*, when both parties are in *delicto*, provided they do not stand in *pari delicto*."

(See Story Eq. Jur. 12 Ed., Secs. 298, 300) * * *.

The court below thought that said principle of equity did not apply to the case at bar. Why it did not, we are not told. The court's opinion merely suggests that it seemed to find some justification in refusing restitution of the gains unlawfully made by Dwyer, because by the unlawful injunction Harbaugh was prevented "in effect from violating the law of the country."

But what principles of justice or equity is so emphasized? Quoting from the case of *Martin vs. Brooks*, cited by the Master (69 U. S. 2 Wall, 70), with substitutions to cover the facts:

"It is difficult to see how the statute enacted (against gambling) is to be rendered any more effective by leaving all (the profits taken from Harbaugh by Dwyer under the wrongful injunction in the hands of the latter), instead of requiring him to do exact justice; and what rule of public morals will be weakened by compelling him to do so?"

The only connection between the parties in the case at bar arises through the medium of the obligation assumed by Dwyer—the price of his injunction, the consideration for which obligation was the right to enjoin Harbaugh pending the suit.

The court did not, nor had it jurisdiction, to enjoin Harbaugh's business because contrary to the gambling statutes of the State. It merely assumed jurisdiction because a patent was involved; it merely temporarily enjoined Harbaugh from using his own boxes, because Dwyer made it appear that they infringed his patent.

After Dwyer had abandoned the charge of unfair competition, and the court had decided there was no infringement, the case was ended, except for the duty, still imposed upon the court, to cause *restitution* of that which had been wrongfully taken under its erroneous process. This involved, also, the duty to require Dwyer to do equity under his obligation. *All other questions are collateral* and foreign to the issue before the court.

"The principle that 'he who comes into equity must come with clean hands' does not repel all sinners from the precincts of courts of equity, *nor*

does it disqualify one from obtaining full relief there who has not done iniquity in the very transaction concerning which he complains. The wrong that may be involved to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays."

Talbot vs. Independent Order of Owls, 220 Fed. 660, 662 (C. C. A. 8th, 1915).

This doctrine is also supported in Trice vs. Comstock, 121 Fed. 620 (C. C. A. 8th, 1903).

The maxim can not be invoked by the party who, tho a guilty participant, tries to shelter himself behind it in order "to remain in enjoyment of what he now seeks to show are illy gotten fruits."

Brown vs. Grove, 80 Fed. 564, 567 (C. C. A. 4th, 1897).

It is always to be borne in mind that *the court here is not asked to enforce a contract between the parties.* There was none. The parties were not interested jointly in any enterprise, but were competitors. *The transaction out of which the money, now withheld by Dwyer, was obtained has long since been closed. The only connection between the parties is that forced upon Harbaugh by the wrongful injunction obtained by Dwyer from the court, over the protests of Harbaugh. The court is asked only to compel Dwyer to return the money which he so wrongfully appropriated from Harbaugh's business.*

It is submitted, that the principle of "*leaving the parties where they are assumes that the court has not interfered in the premises at all. But if the court has already interfered, at the instance of the party who would plead this principle, who has reaped a direct benefit from the court's interference, and now holds the funds which he took from the other party by the aid of the court's order, then would not the ordinary principles of justice require restitution first to be ordered by the court, before it could abandon the party seeking relief. If the court committed an error in interfering it should rectify that error first, and not permit itself to be used to the advantage of the party who was favored by such interference and who gained an unconscionable advantage under it.*

The same view point as held by the District Court in the case at bar was considered and rejected by the U. S. Supreme Court in Brooks vs. Martin (69 U. S. 70). As stated in the Master's report (Trans. 45):

"This was a suit for an accounting between parties who had been engaged as partners in the business of purchasing returned soldiers' warrants in violation of the Act of Congress (and therefore illegal). The transactions had long been closed, and a large sum of money had been realized therefrom which was in the hands of one of the partners, who refused to account. As a defense he set up the fact that the purposes of the partnership were unlawful, and that a court of equity would not step

in to enforce its terms, but would leave the parties as it found them.”

Mr. Justice Catron—who wrote the dissenting opinion of the court—concluded (p. 87) that equity should not interfere. But Mr. Justice Miller, speaking for the majority of the court in affirming the judgment of the Circuit Court said (p. 79):

* * * “The traffic was * * * illegal
* * * (but) * * * when the bill in the
present case was filed all the claims of the soldiers
thus illegally purchased by the partnership with
money advanced by the complainant, had been con-
verted into land warrants, and all the warrants had
been sold or located * * * there was then in
the hands of the defendant money, lands, etc. the
results of the partnership. It is to have an account-
ing of these funds and a division of these proceeds
that this bill is filed.”

Then follows the oft quoted words cited by the Master here:

“Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partner because of the original wrong done, or intended to the soldiers? It is difficult to perceive how the statute enacted for the benefit of the soldiers is to be rendered more effective by leaving all this in the hands of Brooks, instead of

requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? * * * The transactions which were illegal have become accomplished facts and can not be affected by any action of the court in this case."

In *McMullen vs. Hoffman* (174 U. S. 639) the court only announced with respect to the doctrine of *Martin vs. Brooks* that it would not extend it to a case where the fraud complained of was *not* confined to the private matters of the parties, but related to matters "in which the whole community was vitally interested." But the court neither qualified, nor restricted said doctrine.

The case of *McMullen vs. Hoffman* (supra) was affirmed on certiorari from this Court of Appeals. When this Court of Appeals decided that case (83 Fed. 373, 384) it said:

"The doctrine of Brooks vs. Martin and kindred cases is and always should be applied in cases where the fraud complained of is between the individuals, which does not in any manner affect the public interest."

The U. S. Supreme Court in *McMullen vs. Hoffman* said:

"There is a difference between the case before us and that of *Brooks vs. Martin*, because in the latter case the fact existed that the transactions in

regard to which the cause of action was based were *not fraudulent*. They related in some sense to *private matters*, while in the case before us the entire contract *was a fraud* and illegal—(note not only illegal but based on *fraud*)—and related to a public letting by a municipal corporation for work involving a large amount of money in which *the whole community was vitally interested*.”

The reasoning of the Supreme Court in *McMullen vs. Hoffman* thruout clearly shows that the reason it distinguished that case from *Brooks vs. Martin* was because the instant case was an agreement between the parties which had a fraudulent object affecting the whole community while in *Brooks vs. Martin* the agreement related only to private matters between the parties and while based upon an illegal business it was not tainted with fraud which affected the public at large.

On page 648 of the opinion the court quotes from *Providence Tool Co. vs. Morris*, saying:

“It is sufficient to observe generally that all agreements for pecuniary considerations *to control the business operations of the government* are a fraud as against public policy.”

Quoting (page 649) from *King vs. DeBerenger*, it says:

“The public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities * * * the purpose itself is mischievous;

it strikes at the price of vendable commodity * * *
It is a fraud leveled *against all the public.*"

Quoting from *Hyer vs. Richmond Co.* (page 642) it repeats:

"That the vice of a combination lies in the fact of secrecy, concealment and deception; the one applicant, tho apparently antagonising the other, is really supporting the latter's application, and the *public* authorities are misled by statements and representations coming from a supposed adverse, but in fact, friendly source."

Quoting from *Embrey vs. Jamison* (page 657)—in which a recovery on promissory notes was not permitted "because the consideration for the notes was based upon a *contract* which was illegal—" the court repeated what Mr. Justice Harlan there said:

"The plaintiff could not be permitted to withdraw attention from that feature * * * by the device of obtaining notes for the amount claimed under the illegal agreement; for they are not founded on a new or independent agreement * * * they do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. *Nor do they represent anything of value in the hands of the defendant which in good conscience belongs to the plaintiff.*"

In *Gilbert vs. American Surety Co.*, 121 Fed. 499, 503 (C. C. A. 7th), the court remarked:

“It is certainly difficult to say how public policy is subserved by allowing the addition of a *private* wrong to a public wrong which necessarily results when without any equivalent in return one party to an *executed* illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been appropriated by his associate contrary to any express agreement, or common honesty, and which in good conscience the benefited party can not retain.”

As mentioned, the *only connection* of Harbaugh with Dwyer was *forced* upon him by the wrongful injunction. The transaction has long since been closed, and Dwyer is holding that which he wrongfully appropriated by the injunction. Dwyer is merely trying to drag in the illegal-business plea—a wholly collateral matter—in order that he may pervert the maxims of equity into a shelter, behind which to hide himself, and thus keep that which in good conscience he should not be permitted to keep. And it is submitted that the wrong here complained of by Harbaugh, as having been perpetrated by Dwyer against him, should be redressed in conformity with the principle of *Brooks vs. Martin*, as interpreted by this court.

As stated in *McMullen vs. Hoffman* (*Supra*), the defense of illegality “is a *very dishonest one*, and it lies ill in the mouth of the defendant to allege it, and *it is only*

allowed for public consideration in order to better secure the public against dishonest transactions.”

In that case there was a contract between the parties which the court was asked to enforce. The contract was not only illegal, but fraudulent in its inception, and purpose, with regard to the whole community; the fraudulent purpose being to boost the price of a contract for public work. It was not a matter of merely deciding the *private* rights of the parties under an illegal transaction. To have upheld that contract would have disregarded the rights of, and encouraged fraud with respect to, the community at large.

But in the case at bar there is no contract between the parties, except such as was *forced* upon Harbaugh, and as arises, by implication, on the part of Dwyer, under his obligation not to induce the court to grant an unlawful injunction, and not unlawfully to use the injunction which was granted. That was the condition imposed by the court, and safeguarded by the pledge which the court exacted from Dwyer, represented by the \$10,000 still in the custody of the Clerk of the District Court.

It would not safeguard the public interest, nor strengthen morality to permit one of two parties, each separately engaged in an illegal business, as competitors, to use the process of a court of equity for the express purpose of unlawfully appropriating his competitor's share of that business. Nor does it promote public morals, or confidence in our courts, to permit such party, in

order to *avoid* his bond, given as a pledge of his good faith in suing out the process, *after* his unlawful acts have been accomplished to set up the illegality of the business so appropriated, for the express and only purpose of keeping that which he has unlawfully made from his competitor by the aid of the court's process.

If in the case at bar, the violation of the gambling statutes by one or the other of the parties must be overlooked by the court in deciding the issue, *who shall be exonerated? Shall it be he who is the greater transgressor? Shall it be he who unlawfully made use of the process of a court of equity to fill his pockets with ill gotten gains to overflowing?*

The transactions of the parties bearing on the violation of the gambling statutes are completed and past, "and can not be affected by any act of the court in this case;" but the measurement of the fraud perpetrated by Dwyer still rests in the scales of justice.

The principle of "leaving the parties where they are" is not applicable, because the court has already interfered—by granting the wrongful injunction—thereby placing one of the parties in a position of advantage over the other. Therefore, before that principle can equitably be applied here, the court should now, first, apply the *principle of restitution*.

As mentioned, the obligation assumed by Dwyer was the price of his injunction. The obligation and the consideration therefor had nothing to do with the business in which the parties were separately engaged as com-

petitors. The *independent consideration which Dwyer received* was the right to suppress Harbaugh, as it were, as a competitor, pending the injunction. That Dwyer violated his obligation is manifested by his refusal to refund to Harbaugh what he wrongfully took from him by the injunction.

In *Armstrong vs. Toler*, 24 U. S. (11 Wheat.) 258, the court said:

“If the promise be entirely disconnected with an illegal act and is founded on a new consideration, it is not affected by the act.” * * * Because—as Chief Justice Marshall said—“This would be to connect distinct and independent transactions with each other, and to infuse into one, which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage.”

In *Planter's Bank vs. Union Bank*, 83 U. S. (16 Wall.) 483, 499, the Supreme Court said:

“The illegal transaction has been consummated * * * It is enough that *the defendants have a thing in hand that belongs to plaintiffs*. * * * Though an illegal contract will not be executed, yet *when it has been executed by the parties themselves* and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a

promise express or implied, and * * * the court will not unravel the transaction to discover its origin.”

The doctrine of the last mentioned case was quoted with approval by this Court of Appeals in *City of Santa Cruz vs. Wikes*, 202 Fed. 357, 372.

As mentioned above, under circumstances as here appear, the “clean hands” maxim cannot be invoked by the party, who, though a guilty participant, tries to *shelter* himself behind it in order to *remain in possession* of that which he *illegally* obtained. *Brown vs. Grove*, 80 Fed. 564, 567.

The wrong that may be involved to defeat the party seeking relief must have an *immediate and necessary* relation to the equity for the enforcement of which he prays.

Talbot vs. Independent Order of Owls, 220 Fed. 660, 662.

Trice vs. Comstock, 121 Fed. 620.

The remaining questions raised by appellee Dwyer in the court below, on his exceptions to the Master’s report, are mostly questions of fact, involving incidentally the application of rules of law and equity which will briefly be treated by appellant. The court below did not deem it necessary to consider these questions, and appellant hesitates to burden this court with an extensive re-examination of them.

As said in *Cimiotti Co. vs. American Co.*, 158 Fed. 171, in affirming the decree of the court below:

“The well settled rule is that the conclusions (of the Master) on matters of fact have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been errors or mistake.”

Dwyer contended that the burden of establishing the amount of profits wrongfully made by him rests wholly on Harbaugh; and further contends that the proof adduced by Harbaugh and accepted by the Master is insufficient.

Dwyer further contended, in the court below, that the rule with respect to the *trustee Ex Maleficio* was erroneously applied by the Master, because such rule is founded purely on section 4921 of the Revised Statutes, describing what may be recovered in patent cases, and, therefore, the case at bar does not come within such rule.

The Master in his report cited *Tilgham vs. Proctor*, 125 U. S. 136, 145, holding that in patent infringement cases the rule in equity is:

“The profits made by the infringer belong entirely to the patentee, and not to the infringer, and it is inconsistent with the ordinary principles and practice of courts of chancery * * * to permit a wrong-doer to profit by his own wrong.”

Also cited *Westinghouse Co. vs. Wagner Co.*, 225 U. S. 604, 618 which

“Presented a case where the court was called on to determine the liability of a trustee *Ex Maleficio* who had *confused his own gains* with those which belonged to the plaintiff. One party or the other must suffer. The inseparable profits must be given to the patentee or the infringer. *The loss had to fall on the innocent or the guilty. In such alternative the law places the loss on the wrong-doer.*” * * * In the latter case the court cites two instances of infringements of copyrights with the remark: “In both, as in patent cases, the infringer was a trustee ‘for the plaintiff in respect of profits.’ * * * *On established principles of equity, and on the plainest principles of justice, the guilty trustee can not take advantage of his own wrong.*”

Applying remarks in the last mentioned case, with substitutions conforming to the facts in the case at bar: Dwyer’s conduct has been such as to *preclude* the belief that he has derived no advantage from his unfair and fraudulent acts in the premises. He testified that *the business was profitable* (Trans. 182), and that *his computation of profits agreed with those made by Harbaugh.* (Trans. 179-180.) Therefore, *the profits illegally taken by him from Harbaugh must constitute some substantial part* of the hundreds of thousands of dollars earned by Dwyer during the injunction period.

Thus Dwyer’s own testimony and confession refutes his contention with respect to insufficiency of the evidence concerning the illegal gains he made.

Atlantic Coast Realty Co. vs. Townsend, Executor, 124 Va. 490, 510.

The burden was on Dwyer to segregate those illegal profits himself, if he disagreed with Harbaugh's computation.

Findlay vs. Carson & Walker, 97 Iowa 537, was an action on a bond, for wrongful injunction restraining plaintiff from selling coal, and the items of damages allowed were loss of profits and interruption of business; the court cited:

Willis vs. City of Perry, 92 Iowa, 297. This was a suit for damages arising from depriving plaintiff of the free and accustomed use of the water in her well by the city tapping the supply stream for artificial and extraordinary purposes. The evidence showed that plaintiff operated a bath house supplied by water from the well, and that the act of the city deprived plaintiff entirely of its use, for a portion of the time, for her bath house.

The court said (306):

"The law does not require impossibilities, and can not therefore demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted, the damages thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of."

The court cited the case of *The City of Terre Haute vs. Hudnut*, 112 Ind. 542, 551 (which involved damage done to a mill by a defective sewer), holding that:

“What exists in the present or has existed in the past can not be considered a matter of speculation.

* * *

(555) “The adjudged cases very clearly show that in actions to recover damages resulting from tort, a more liberal rule in favor of the plaintiff prevails than in actions to recover for a loss resulting from a breach of contract; yet, in the latter class of cases the overwhelming weight of authority supports the doctrine that profits when not entirely speculative, may be taken into account. * * *

(556) “It is not to be forgotten that the law does not require absolute certainty in any case. Even in crimes of the highest grade, demonstration is not required. In civil cases all that is deemed requisite is a fair and reasonable degree of probability. * * * Lord Mansfield says: ‘that the only degree of certainty attainable in legal proceedings is a probable one,’ and this is the doctrine of logical as well as law writers.” This case elaborately discusses the subject of profits as recoverable damages.

In *Wintermute vs. Redington*, 1 Fisher 239, 17896, Federal Cases, it is held that the profits of the defendant due to the invasion of a patentee’s rights are equally the measure of the plaintiff’s damages.

In *Dean vs. Mason*, 20 How. (61 U. S.) 198, 203, the court remarks that this rule *takes away the motive* of the infringer of patent rights.

The rule is also applied in unfair competition cases. *Walter Baker Co. vs. Slack*, 130 Fed. 514, 519.

Dwyer contended that if he had not enjoined Harbaugh he would have made at least a part of the profits in dispute.

In the trade-mark case of *Saxlehner vs. Isner, et al*, 138 Fed. 22, 24 (C. C. A. 2nd), a similar contention was made. The court said:

“It would be casting an intolerable burden upon the complainant in such a case if after proving the fraud, the infringement and the profits he were compelled to enter the realm of speculation and to prove the precise proportion of the infringer’s gains attributable to his infringement. The argument reduces itself to this: The defendant says: ‘If I had been honest I could have sold at least a part of these goods and as you failed to show what that part is, you are entitled to recover nothing.’ The answer is: ‘You were not honest.’”

In *Head vs. Porter*, 70 Fed. 498 (C. C. D. Mass.), Circuit Judge Colt analysed in detail the difference between a *tort followed by direct pecuniary benefit to the wrong-doer* and a tort not followed by such results. While this was a patent case the principles are of universal application. The court said:

“The bill calls upon the wrong-doer to refund the profits he made, as it would be inequitable that he should make a profit out of his own wrong.

Profits are the gains or savings made by the wrong-doer by the invasion of plaintiff's property rights."

He then referred to the case of ~~Sales~~⁴ vs. Ry. Co., Federal Case No. 12424, in which Judge Hughes said:

"Let us now suppose the case of a person who takes possession of, and uses another's horse, wagon and team or threshing machine without his knowledge, consent or authority. In such case * * * the owner may recover damages in trespass for the tort, or he may waive the tort and sue in assumpsit on the implied promise to pay what is equitably due for the use and possession of the property. * * * The case I supposed is in principle precisely the case we have at bar, for there is no magic quality in the property of the patentee in his patent to distinguish this case from the one just supposed. * * * Judge Colt then said: I can not assent to the proposition that the profits actually made by an infringer for which recovery is sought by his bill in equity are the same as damages in an action of libel, slander, diversion of a water course, trespassing, breaking up meadow, pasture land and similar actions of tort. The former are the actual, *direct* pecuniary benefits capable of definite measurement acquired by the wrong-doer. The latter are primarily the loss suffered by the injured party where the wrong-doer realizes *no* pecuniary benefit, or only such as are indirect, indefinite or rest in speculation, compromise, or arbitrary adjustment."

The rules which apply the profits of the tortfeasor as damages, as ascertained in unfair competition and patent cases are not peculiar to these, but they are taken from the general doctrine concerning damages and profits.

In *Wolcott vs. Mount*, 36 N. J. L. 262, 269, it is held:

The rule excluding "profits" as damages in tort as well as actions on contract has been removed. "The wrong-doer must answer in damages for those resulting injurious to others which are presumed to have been within his contemplation when the wrong was done."

Section 4921 of the U. S. Revised Statutes, relating to patent suits, did *not* confer thereby the power upon courts of equity to compel an accounting for, and refunding of, the gains made by the infringer of a patent. *That power existed before*; the section merely enlarged the court's jurisdiction, in that it permitted damages also to be awarded in a suit in equity.

As stated in *Root vs. Lake Shore, etc. Ry. Co.*, 105, U. S. 189, 217, this section was part of the act to revise, consolidate, and amend the statutes relating to patents and copyrights (16 Stat. at Large 198, Sec. 59). The court cited *Birdsall vs. Coolidge*, 93 U. S. 64, saying:

"Gains and profits are still the measure of damages in equity suits, except in cases where the

injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent, in which the provision is that the complainant shall be entitled to recover in addition to the profits to be accounted for, the damages he had sustained thereby." The court further said: "Quoting from *Fenn vs. Holme*, 21 How. (62 U. S.) 484, 'In every instance in which this court has expounded the phrase * * * proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted * * * the equity law as defined and enforced by the Court of Chancery in England.' * * * The court then cited English cases and said: "*When * * * relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits, and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not however, by assessing damages, which was the peculiar office of a jury, but requiring an account of profits, on the ground that if any had been made, it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make profit out of his own wrong.*"

The cases cited illustrated the application of this principle to suits involving the wrongful taking of timber, or ore, thus showing conclusively that this principle existed independently of, and long before, the enactment of section 4921 of the Revised Statutes.

When a court of equity has once acquired jurisdiction of a cause, it will proceed to complete determination of all rights of the parties thereto, according to the principles of equity.

Appellant Harbaugh's recovery is not limited to the \$10,000 which Judge Wolverton required Dwyer to deposit as a condition for granting the injunction as security for the damages which the defendant might sustain. The Master's procedure was correct when, without respect to the amount of the security, he found that the sum of \$13,650 represented the damages defendant Harbaugh sustained by reason of Dwyer's wrongful injunction. Such procedure is in complete conformity with the principle announced by the United States Supreme Court in

Arkadelphia Co. vs. St. Louis Ry. Co., 249, U. S. 134, 145, in which the court said:

"To the extent that the supplemental decree now under review awards a recovery against the *sureties* for claims accruing after the final decree, it must be modified, because not covered by the injunction bond; but in our opinion this portion of the claims is allowable against the Railroad Co. themselves, upon the principle, long established, and of general application, that a party against whom an erroneous judgment, or decree, has been carried into effect it entitled, in the event of reversal, to be restored by his adversary to that which he has lost thereby."

Note in this regard that the provision of the injunction order was (Trans. 12 (3)) that the deposit of \$10,000 was “to *secure* the payment of *any* damages which may be awarded to defendants,” therefore was not a limitation of the recovery which may be had, but *merely specified the amount of security to be given* for such recovery.

With regard to the discretion of the court below in awarding damages for the violation of an injunction erroneously granted by it, it is conceded that such discretion exists in the first instance. In the case at bar the court exercised its discreiton by directing that the damages sustained by the defendants be ascertained in this suit and that the inquiry before the Master was in obedience to such directions of the court.

In commenting upon such discretion the Supreme Court said in *Russel vs. Farley*, 105 U. S. 433, 443,

“It would be unjust to the defendant to disregard, and not to give effect to the undertaking which was the price at which the plaintiff accepted the injunction.”

Furthermore, in the case at bar the Master found in his report ¹(Trans. 42) that in his opinion

“The evidence does not disclose that degree of good faith on the part of the plaintiff in obtaining the injunction to warrant the exercise by the court of any discretionary power.”

The decree of the District Court is contrary to equity and justice, and should be reversed, with directions to confirm the Master's report, and to grant the petition of Harbaugh praying for the restitution of the money wrongfully taken from him by Dwyer by means of the wrongful injunction.

Respectfully submitted,

T. J. GEISLER,
Counsel for Appellant.

No. 3946

United States Circuit Court of Appeals for the Ninth Circuit₃

PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the United States District Court
for the District of Oregon

JOHN W. ROBERTS,

E. L. SKEEL,

Solicitors for Appellee.

FRANK A. STEELE,

Of Counsel.

FILED

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United States Circuit Court of Appeals for the Ninth Circuit

PAUL HARBAUGH,

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vs.

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Appellee.

APPELLEE'S BRIEF

Upon Appeal from the United States District Court
for the District of Oregon

Statement of the Case.

On the 22nd day of March, 1919, John F. Dwyer, the appellee, brought his bill of complaint against Paul Harbaugh, the appellant, et al., in the United States District Court for the District of Oregon, alleging infringement of Letters Patent No. 1,268,222, dated June 4th, 1918, issued to appellee for "Ticket Dispensing Machines." By his bill he sought a permanent injunction, as well as

injunction *pendente lite* against the alleged infringement. On the 27th day of March following, the matter came on for hearing before Honorable Judge Wolverton, upon appellee's motion for temporary injunction. The appellee appeared in person and by his solicitors. The appellant Harbaugh appeared in person and by his solicitors and resisted the motion, and a full and exhaustive hearing was had.

The alleged infringing device, as well as the patented device of appellee, was introduced in evidence. Affidavits and other evidentiary matters, pro and con, including the patent in issue, were considered by the court. Thereupon Judge Wolverton, after arguments of counsel, found that appellant's device was an infringement of the claims of appellee's letters patent, and granted a temporary injunction restraining appellant from further making, using or selling the infringing device. As a condition to granting the injunction the court required appellee to give a bond in the sum of \$10,000, or deposit Liberty Bonds of like amount "*to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patent in suit.*" (T. R. 11.) Appellee deposited Liberty Bonds in the amount fixed and the injunction *pendente lite* issued.

The defendants answered, setting up several

defenses and further pleaded, in substance, that appellant Harbaugh was the only party defendant in interest. By supplemental answer, he pleaded issuance to him of letters patent, number 1,339,823, of date May 11, 1920, for "Ticket Dispensing Device." Thereafter the cause came on for trial upon bill and answer and evidence introduced by the parties. The court on the 20th day of December, 1920, filed an opinion in the cause holding that appellee's patent was narrow, and not entitled to a broad range of mechanical equivalents, and as so construed was not infringed by Harbaugh's device; and further held the device to border upon a gambling instrument, and that equity would not interfere on the ground of public policy (T. R. 27).

Following the opinion, a decree was entered dismissing the bill of complaint, vacating the injunctive order and referring the cause to the standing Master of the Court to ascertain the damages, if any, suffered by the defendants by reason of the injunction (T. R. 27-40). The matter was heard by the Master upon the order of reference, and on the 5th day of June, 1922, he filed his report, assessing damages against appellee in the sum of \$13,650 (T. R. 41-52). Appellee filed exceptions to the Master's report, which in due time came on to be heard by the court. The hearing was followed by an opinion and the entry of decree based thereon setting aside the Master's report, refusing appellant any recovery for loss arising out of the injunctive

order, and exonerating the injunction bond (T. R. 52-59).

From this decree appellant prosecutes his appeal. In our further statement of the case, we will, therefore, confine ourselves to those facts which are material to the issues presented by the report of the Master, and the exceptions thereto, and the decree rendered upon the exceptions to the report. It will not be out of place at this point to refer to some facts that would not be material, except for certain statements made by appellant, and arguments based thereon, in his brief relating to the good faith of appellee in prosecuting this suit.

In the first place, Dwyer had successfully applied for a United States patent, clearly and specifically describing his device. As is self evident in a patent case, the patent in issue is the first thing to be considered by the court. The court, therefore, had full knowledge of this patent. In the application for preliminary injunction affidavits were presented by both sides, including the affidavits of patent experts, so that Judge Wolverton had the advantage of a clear description and exposition of the patent from the viewpoint of both sides. Furthermore, Dwyer was concededly the first to make use of a device of this character. One infringer by the name of Enloe had begun business in Portland and had purchased merchandise for the purpose of the infringement, from Harbaugh, the appellant in this case (T. R. 72, 73).

When Enloe was enjoined, Harbaugh, the appellant admittedly set out to imitate plaintiff's device.

He made minor mechanical changes with the hope of avoiding, by a technical difference, the charge of infringement, while appropriating the idea. The two devices look alike and operate substantially alike and are used for the same purpose. Harbaugh merely substituted a pack of tickets for a roll of tickets and provided a removable top instead of a removable back, which changes were and are, in our opinion, merely mechanical equivalents. That Harbaugh was an imitator was conceded by himself.

“Question. And you got this idea, Mr. Harbaugh, for using your device, whether it is the same as his or not, from the one—from having seen Mr. Enloe and the plaintiff in this case selling merchandise by means of this device, isn't that right?

Answer. Probably.

Question. Now, that is a fact, isn't it? That you had never seen it before until you saw either the plaintiff or Enloe's, isn't that a fact?

Answer. Yes.

Question. Now, Mr. Harbaugh, you had sold for Mr. Holsman a considerable quantity of merchandise through Mr. Enloe, by means of his Silent Salesman, hadn't you?

Answer. Yes.

Question. And when he was enjoined by the court, it cut off a considerable source of revenue for you, didn't it?

Answer. Yes.

Question. Then you took this device and started to see if you and Holsman couldn't work out something of it for yourself. Isn't that right?

Answer. Something of that nature, yes.

Question. Now, as far as new business was concerned, after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced in evidence as plaintiff's Exhibit 2, you built another kind of box, didn't you, with which you supplied all the business you have been able to get?

Answer. Yes.

Question. And as you said yesterday, you had never seen this device used or any selling of merchandise by a device of this kind until you saw the Dwyer and this Enloe device?

Answer. That is correct.

Question. And that is where you got your idea?

Answer. Yes, sir."

Harbaugh knew he was infringing the substance of Dwyer's idea and was afraid of the consequences (T. R. 121).

While it is not probable that the Circuit Court of Appeals will now care to concern itself with the details of this device, yet in order to show the good faith of Mr. Dwyer in bringing this suit, and of his reliance upon reputable patent authority, we ask the court to read the testimony of Mr. H. L. Reynolds as set out in T. R. 75, wherein he clearly summarizes the similarity between the two machines. He points out "that the results secured in the one case are the same as in the other and the means for securing it are also the same." He further points out that the only difference consists of mere mechanical details and holds that the substitution of a ticket pack for a ticket roll and removable top for a removable back are mere mechanical equivalents. The fact that Judge Wolverton, after a full hearing, held the patent infringed, shows that Dwyer had at least reasonable grounds for endeavoring to show the validity and infringement of the patent. Judge Bean, while holding the patent not infringed, considered the case for several weeks before arriving at a decision.

Appellee Dwyer took an appeal from Judge Bean's decision to the Circuit Court of Appeals, but immediately ceased business and abandoned said appeal when the Supreme Court of the State of Washington, in a suit which Mr. Dwyer instituted,

held that the prevalent use of the device was illegal. We submit from the above that Mr. Dwyer was acting in good faith in seeking relief from the courts, and that the patents and the opinion of patent counsel fortified him in his right to secure an adjudication upon the question of infringement.

Furthermore, Dwyer brought his infringement suit believing that the use of the device as disclosed in the patent, and as imitated by Harbaugh, was not in violation of the gambling laws. He had obtained a decision of the Superior Court of King County, Washington, adjudging the Silent Salesman a lawful device (T. R. 180), and in other courts of inferior jurisdiction there were similar holdings. Justified by the patent itself and by the decisions of these courts, he had a right to his belief, erroneous though it may have been proven to be. On the other hand, Harbaugh sought to use the plea of illegality of the device as a defense in the infringement suit. He, himself, testified (T. R. 91) that there was a lottery connected with the business and that the device was "actually a substitute for the punch board." So that Harbaugh, in securing the dismissal of the injunction suit, received the benefit of his own showing of illegality. It is obvious that a ticket dispensing machine such as this might be used for perfectly legitimate purposes. It is the use which Harbaugh admitted he made of it which was illegal and gambling. There is no claim at any place in the record that Harbaugh ever used

this device or attempted or intended to use it for any purpose other than selling merchandise on the lottery basis.

The first, second and thirteenth exceptions present the question whether the loss of anticipated profits that might have arisen from the operation of a gambling game can form the basis of recovery in a court of equity. It becomes necessary therefore to inquire whether the defendant's use of the device in controversy was illegal. As to this there is no controversy. In the Master's report it is said:

"Both the plaintiff and the defendant admit that the device used by them in their respective business was in effect a gambling device."

The Supreme Court of Washington some months after the decision in the infringement suit, in the case of *Dwyer vs. City of Seattle*, 199 Pac. 740, held the device to be prohibited by statute.

Judge Bean in his opinion sustaining the exceptions to the Master's report, after describing the operations of the machines, says:

"It is therefore clearly, and is now conceded to be a gambling device."

The operation of the gambling device is prohibited by the statutes both of Oregon and Washington.

Harbaugh himself testified on the trial that his only use for the machine was to sell merchandise by giving the purchaser an element of gain by chance, so that as the records stand, he used his device in no other way, and intended to use it in no other way than for gambling purposes, and in that use lay all his profits (T. R. 90-91).

The third and fourth exceptions to the Master's report go to the question as to whether the appellant Harbaugh is the real and sole party in interest. (See T. R. pp. 165-166 as to Harbaugh's pooling agreement respecting any prospective damages he might secure.)

The fifth and sixth exceptions present the question as to whether appellant was chargeable with such violations of the injunction as will preclude him from recovery on the bond.

The seventh, eighth, ninth and tenth exceptions raised the question as to the sufficiency of the evidence to afford any reasonable basis for the computation of alleged loss of profits and gains by appellee. On this question we think it fairly appears from the evidence that Harbaugh's books of account were so mutilated as to be worthless (T. R. 122-135); that the entries made therein were sometimes made by his bookkeeper and sometimes by himself, but were not made in orderly sequence of time and that several of the entries upon which he based his claim of loss of profits were made long after the

actual date of the transaction, and after the issuance of the temporary injunction (T. R. 122-133); and for most of the time he kept no checking account (T. R. 121); that for the period when he kept a checking account his check stubs are lost (T. R. 121); that his cash book and express book were lost, and could not be produced (T. R. 124); that he had no records, vouchers or invoices as to goods bought (T. R. 120); that he had no original record of any moneys received or expended (T. R. 126); that his correspondence was lost (T. R. 137); that he was unable to fix any profits from merchandise disposed of by his machines (T. R. 147); that it was impossible to form any opinion or judgment as to the amount of business that he might have done after the injunction, Harbaugh, himself, testifying (T. R. 130-131):

“It would be impossible to state definitely what amount of business I would be able to do the following month, assuming I could use this box (Plaintiff’s Exhibit 2) because of certain business conditions that existed generally throughout the country. It might depend on the business ability of the people with whom these boxes were placed; on the retail trade they got during that period; on the state of business conditions, whether it was a healthy condition or sluggish where the boxes were placed; on the spending ability of the people who patronized the merchants with whom the boxes were placed. Also on the acquiescence of the police authorities in their disposition to al-

low the stuff to be sold in the manner in which it was sold, whether the returns would be little or much. There have been a number of cases where I have been compelled to discontinue the use of these boxes in certain localities because of police interference. This has been true in certain localities in both Oregon and Washington and might be true any place. In other words, this device has been construed by a number of police authorities as a gambling device.”

Furthermore, there is no word of evidence in the whole record that appellee ever did business with a single, actual or prospective customer of appellant. It was not for appellee to prove that he did not make a profit out of appellant’s customers. It was for appellant to prove that he did. By no process of reasoning can his suppositions, speculative loss of anticipated profits be made a measure of our gain, and unless we gained he has no possible basis for recovery even under the Master’s theory.

The eleventh exception presents the question as to whether recovery can, in any event, exceed the amount of the bond.

Brief and Argument.

In presenting the law of the case, we state our propositions in the following order:

First: The anticipated profits sought to be recovered, being profits that would have arisen from

a criminal act, viz: the operation of a gambling game, equity will not aid appellant, because contrary to public policy and against good morals. Or, stated in another way, the anticipated profits that might arise from the commission of a crime are not recoverable from one who interferes with, interrupts or prevents the crime.

Second: There having been a substantial violation of the injunctive order by appellant, he will not be heard in a proceeding to recover on the injunctive bond.

Third: The evidence of loss of anticipated profits is so speculative, uncertain and remote that it affords no basis for a reasonable computation.

Fourth: The amount of the injunctive bond fixes the extreme limit of appellant's recovery.

I.

As we have seen, appellant's machine is admittedly, and beyond peradventure of a doubt, a gambling device, used exclusively for gambling. Stripped of all verbiage and baldly stated, appellant's proposition is this:

"I was engaged in the commission of a crime and making money out of my criminal acts. By injunction you interrupted my criminal course. Thereby you deprived me of the fruits of the crime to the amount of \$13,650.00. You were engaged in

the commission of a similar crime. By your act you eliminated competition between us, and took the profit I might have made out of my criminal operations. Therefore, you must pay me what I would have received as the result of my criminal activities, if you had not interrupted me."

Let us state a parallel case in more simple terms. Says appellant: "I was burglarizing a house. It was filled with loot. You were engaged in a like enterprise. You got the drop on me, made me get out and took all the loot yourself. Pay me, therefore, the value of what I would have taken if you had not interfered and taken it yourself." Now, the comparative enormity of the illustrative crime, and the crime in the pending case, is in no wise material, for the underlying principle must be the same.

Judge Bean said:

"He was prevented by the injunction, in effect, from violating the law of the country, and he claims now that he is damaged in a very large sum of money by reason of that fact." (T. R. 57.)

Appellant's machine is a gambling device and within the condemnation of the law. The operation thereof being not only contrary to public policy, but in direct contravention of penal statutes, no enforceable cause of action could arise out of its operation in favor of the operator. This principle

of law is too well established and too frequently recognized to require the citation of any authority. It is true, however, that enforceable liability sometimes arises out of a transaction that is wholly collateral to the unlawful business when it rests upon an independent consideration, unconnected with the illegal enterprise. It is contended by the appellant that the liability he seeks to impose upon the appellee falls within the last description. So we propound the question: "Does the liability of the plaintiff to the defendant, if any, arise out of a matter collateral to the unlawful business and does it rest upon an independent consideration unconnected with the outlawed enterprise?"

Or, to state it in another way: "Is it necessary to prove the illegal business—the operation of a gambling game, device or machine—and the illicit profits arising therefrom, in order to fix the amount of defendant's alleged liability?"

It seems too clear for argument that a negative answer must be given to the first question, and an affirmative one to the second. The order requiring the deposit of \$10,000 in lieu of an injunction bond is as follows:

"To secure the payment of any damages which may be awarded to defendants," etc.

II.

Appellant's solicitor, in his brief in the lower court, says:

“The direct cause of the loss of business which Harbaugh sustained was being forbidden to use his vending machines.”

III.

High, in his work on Injunctions, Sec. 1663, says:

“Liability upon an injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction.”

The defendant says his damage is measured by the loss sustained by being forbidden to use his gambling machine. The law says he is limited to the damage that arises from the suspension or invasion of his vested, legal rights by the injunction.

Now, we must first inquire what vested, legal right the defendant had that was suspended or invaded by the injunction. His counsel answers that it was the right to the use of his gambling machine. The question then is: Can a man have a vested, legal right to the use and operation of a gambling game, or in the conduct and operation of a business which the law denounces as a crime? The question seems to answer itself. Let us examine it further by way of illustration:

John Doe and Richard Roe each operate a gambling house in adjoining premises. John Doe is making a net profit of \$1500 a month from his

house. Richard Roe enters Doe's house *vi et armis* and puts him out, closes up the house, and by means of force and threats prevents operation for nine months. Doe sues Roe, measuring his damage by the profits he would have made by the operation of his games, and alleging that Roe received the profits Doe would have made out of his unlawful enterprise. Is Roe a trustee *ex malaficio* who can be called into a court of equity to account? The proposal shocks common sense and common decency.

The terms of the order requiring the deposit of \$10,000 as a condition precedent to the issuance of the injunctive order are:

“To secure the payment of any damages which may be awarded to defendants, if upon final judgment it shall appear that defendant did not infringe the patents in suit.”

Now, what damages has he complained of? Why, the loss of profits that would have accrued to him through the operation of an unlawful business, viz: the running of a gambling game. What difference can it make in principle whether the law mistakenly stops a man by injunction from reaping profits from an unlawful business—bootlegging, brothel keeping, robbery, burglary, smuggling, or running a gambling game; or, whether he is stopped *vi et armis* by his competitor, as illustrated by the above hypothetical case of Doe and Roe? It must be admitted that in neither case would his action

or suit be entertained, because of the unlawful source of his supposed profits. In the case at bar the source for the measure of damages is the profits of a gambling game, in which appellant of course had no vested legal right.

Appellant predicates his right to recover upon this syllogism:

“I was engaged in a criminal business and making large profits therefrom. You interrupted my unlawful operations whereby I lost my illegal gains. Therefore, you must pay me the earnings I would have taken from the victims of my gambling games but for your interference.”

In other words, he says he has been damaged because he was prevented from committing a crime. His own counsel says it in so many words:

“The direct cause of the loss of business which Harbaugh sustained was being forbidden to use his vending machine.”

His whole argument is based upon that proposition. Of course, it is apparent that the statement destroys the defendant's case, and conclusively precludes his recovery upon the bond.

Mr. Justice Swain, speaking for the court, in *Coppell vs. Hall*, 7 Wall 542-558, says:

“Whenever the illegality appears, whether the evidence comes from one side or the other,

the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the condemnation reaches, it destroys. *The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.*”

Until we read appellant’s brief we had never heard that an error in law, or mistake in weighing evidence, made by a court or judge, *ipso facto* made the litigant, in whose favor the error or mistake happened to be made, a tortfeasor. This is to us a new doctrine. Neither had we heard that a party who sought the courts to protect, or enforce, what he believed to be his rights, did so at peril of being chargeable with actionable wrong, if, perchance, he erred in his understanding of the law, or in his estimate of the weight and legal effect of his evidence. This is also a new doctrine, and we are indebted to appellant’s solicitor for the exposition thereof in his brief.

Appellant has a store of adjectives from which to draw at his will, as he variously terms the injunctive order issued in this case in the usual course of judicial procedure, after full hearing:

“Wrongful, illicit, tortuous, unlawful, illegal, unfair, etc.”

After having aroused his indignation to a

proper degree of heat he reaches a culmination by charging appellee with "unfair competition," and devotes several pages of his brief (39 *et sequi*) to an attempt to apply the equitable doctrine of "unfair competition" to the case at bar. We will answer his argument on this phase of the case with one question. When, or where, has the equitable doctrine of "*unfair competition*" ever before been invoked or applied to competing bootleggers, brothel keepers, bunco steerers, hold-up men, or gamblers? Again, appellant seems to be continuously in error in building the major part of his argument upon the theory that the suing out of the injunction was a tort. This conclusion he reaches by charging appellee with bad faith in the inception of the case, with deceiving and misleading the court, and by calling the appellee bad names.

Now, let us look for a moment at the facts of this case without reference to the solicitor's choice vocabulary of adjectives. In this connection we refer to our statement of the case, page—. Appellee has letters patent issued in due course by the government, *prima facie* establishing the fact that he has invented a novel and useful device. Counsel and those skilled in patent law, advise him that he has a valid patent. *Anisi prius* court of general jurisdiction declares it a lawful device and enjoins police interference with its operation. He believes his patent is being infringed. Counsel and patent attorneys advise him he is correct in his belief. He

goes into the only court competent to give him relief, seeking an injunction to protect what he believes are his rights. He brings before the court his patent and the device constructed under its specifications. He brings also the infringing device, and with it the infringer in person, and his counsel. The court hears evidence, examines the device, declares infringement and grants a temporary injunction. The only fact upon which appellant's charge of bad faith can rest is that we were silent when we should have spoken. But at that time the courts had held the device legal. But appellant was also silent. If appellee is guilty of bad faith, then perforce appellant is guilty of bad faith, and for the same reason. It follows, of course, that appellant and appellee in the light of appellant's argument are in *pari de licto*, and the court will, therefore, leave them where it found them.

Furthermore, if there was any matter of defense, showing an infringement or invalidity, defendant had full opportunity at the hearing on the application for temporary injunction, to present it.

Furthermore, although the case did not come on for trial for twenty months, defendant never moved to dissolve the injunction, and in fact delayed the trial of the case.

Appellant's first proposition (p. 38 of his brief) is:

“To correct that which the court has

wrongfully done by its process is one of the powers inherent in every court of justice. It is more than a mere power. It is a duty founded on the principles of justice.”

So say we all. But, before attempting the practical application of a legal principle to the case in judgment, it is imperative to know what the facts are. Says the solicitor:

“To correct that which the court has wrongfully done by its process.”

Now, there can be no wrong arising out of a process unless there is someone who has a legal, vested, enforceable right that has been injuriously affected or destroyed thereby. Now, what legal, vested or enforceable right has any man to anticipated profits that might have accrued to him from the execution of an unlawful enterprise that is made criminal by statute, condemned by morality and in contravention of public policy? If one commits a trespass in any sort of unlawful resort, made so by condemnation of law, and morals, and the consensus of society, he may be made to respond to damages to the extent of the physical injury inflicted, but the damages could not be enhanced by proof that the injury done necessitated repairs that closed the house for a day or a week, and so precluded the receipt of profits that might have arisen out of the criminal activities of the owner.

If one assaults a gambler, or any other sort of

criminal, he cannot plead the unlawful occupation or the general bad character of his victim, as a defense, but must answer in damages for the injury done. But, if the unfortunate complainant be put to bed for a week by reason of his injuries, can he by way of measure of damages show that he is a gambler and that but for the assault he would have taken from the pockets of the victims of his gambling enterprise \$1,000? Now, these illustrative suggestions are not strained, but fair parallels with the fundamental principles controlling the case at bar.

Appellant says:

“The plaintiff cannot be heard to say that both he and the defendant were engaged in an unlawful business. The transaction is closed.”

He then quotes from *Armstrong vs. Toler*, 24 U. S. (11 Wheaton) 258, as follows:

“If the promise be entirely disconnected with an illegal act and is founded on a new consideration, it is not affected by the act.”

We have no quarrel with this statement of the law. But the facts to which it was applied by Marshall, C. J., have no similarity to those in the case now in judgment. In that case B. imported goods from an enemy country contrary to an embargo act. B. declared the goods for duty. A. became surety to the government for the payment of the imposts. A. had to pay and sued B. to recover.

It was held that the payment by A. was in the nature of an advance or loan to B. for his use for a lawful purpose, viz: the payment of duties due the government, and was unconnected with B.'s unlawful act. A., therefore, recovered. We may be in accord with that judgment, but of what value is the case to us here? If A. had alleged that B. interfered in his smuggling operations and by such interference had deprived A. of illegal profits from the unlawful venture, which B. had realized through a monopoly of trade in contraband, then we would have a substantially parallel case.

Appellant was enjoined from doing an illegal act. That is, by the writ he was prohibited from operating a gambling game. Surely one cannot be allowed to claim damages by reason of being prohibited from committing a crime. In 17 C. J. 797, it is said:

“Loss of profits may not be considered as an element of damages where the business from which they would have resulted was, or would have been, conducted in violation of law. *The profits of an unlawful business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument.* The profits made on Sundays resulting from a violation of the Sunday law cannot have any legal basis for an estimate of damages. As well might it be claimed that the profits resulting from the operation of a gambling house, or a house of ill fame, could be used as a basis for damages.”

Perhaps we should inquire as to what is meant by "A cause of action or liability arising out of a matter collateral to an illegal contract, or unlawful business, and resting upon a new and independent consideration."

The case of *Brooks vs. Martin*, 69 U. S. (2 Wall.) 70, which forms the basis of the Master's opinion, is relied upon to bring this case within the stated exception. But we are sure that case was not rightly decided, and is contrary to accepted principles. But even if good law upon the facts, it is not of value here because the facts are fundamentally different. At all events, while it has not been in express terms overruled it has been so severely criticized and *limited* by the Supreme Court that its authority as a precedent, or as the basis of argument is entirely destroyed. In *McMullen vs. Hoffman*, 174 U. S. 639, opinion by Peckham, J., on page 668, it is said in discussing the *Brooks* case:

"The cases of *Sharp vs. Taylor*, *Tennant vs. Elliott*, *Farmer vs. Russell*, *Thomson vs. Thomson*, and *McBlair vs. Gibbs*, were cited as authority. We have already adverted to each of them (655-666), and we admit it is quite difficult to see how, with the exception of *Sharp vs. Taylor*, the principle upon which they were decided could be applied to the case then before the court."

But the case of *Sharp vs. Taylor* had been repudiated and practically overruled by the English

courts. (See opinion by Jessel, M. R., in *Sykes vs. Beadon*, 11 Ch. Div. 170-195.)

It follows, therefore, according to Justice Peckham, speaking for the court, that *Brooks vs. Martin* rests upon four cases that are not germane and a fifth that has been repudiated by the very jurisdiction that decided it. So that whether considered upon reason or authority, it is not of much value.

But in any event the facts in the case of *Martin vs. Brooks* differ so materially from the facts in the case at bar that even though the *Martin* case be considered as rightfully decided upon its peculiar facts, it still has no value as a precedent in the determination of the case now in judgment. In that case there was a partnership entered into between Martin and Brooks and one of the partners engaged in the purchase of soldiers' claims long before script or land warrants were issued by the government, and contrary to the provisions of the Act of February 11, 1847, providing for the granting of land warrants to be issued to soldiers. The transactions of the partner were for the benefit of the partnership. He purchased many soldiers' claims. Subsequently the warrants and script which were issued to the soldiers, from whom the claims had been purchased contrary to the provisions of the statute, were by the soldiers duly assigned to the purchaser and thereafter those warrants were located upon lands. The lands were subsequently in large part sold, some

partly for cash and some partly on mortgages, and at the time of the commencement of the suit, the assets of the partnership consisted almost wholly of cash, securities or of lands. Judge Peckham, after stating the facts in substance as above in his opinion in *McMullan vs. Hoffman, supra*, said:

“The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The original wrong done or intended to the soldiers had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts and could not be affected by any action which the court might take.

“The cases of *Sharp vs. Taylor*, *Tennant vs. Elliott*, *Farmer vs. Russell*, *Thompson vs. Thompson*, *McBlair vs. Gibbes* were cited as authority for the proposition. We have already adverted to each of them and we admit it is quite difficult to see how, with the exception of *Sharp vs. Taylor*, the principle upon which they were decided could be applied to the case then before the court.”

As before noted, the case of *Sharp vs. Taylor*

has been practically overruled. So we are unable to see of what special value *Martin vs. Brooks* is, because, first, upon the facts it is not german; and second, because the principle upon which it was decided is so severely criticized and questioned that it is practically eliminated as an authority.

McMullen vs. Hoffman, however, clearly defines what constitutes a *collateral matter or contract and independent consideration*. So there is no longer need for dispute or difference of opinion as to when a case falls within the exception. From the definition and illustrative cases there found, it seems beyond controversy that the instant case does not arise out of a collateral matter and does not rest upon an independent consideration, disassociated with the unlawful enterprise.

Funk vs. Gallivan, 49 Conn. 124 (11 Amer. R. 210).

King vs. Winants, 71 N. C. 469 (11 Amer. R. 11).

The case of *Armstrong vs. Toler*, *supra*, adopted by the Supreme Court in *McMullan vs. Hoffman*, *supra*, is the leading case, illustrative of what is meant by

“Arising out of a collateral matter, and resting upon an independent consideration.”

Let us see if it is possible to bring the facts of the case at bar within the scope or reason of *Armstrong*

vs. Toler. The appellant must prove that he was conducting a gambling game, viz: was engaged in a criminal enterprise; that he was making a profit out of it; that he continued his gambling operations for 45 days, when he was stopped by the injunction; that his net winnings amounted to a certain sum for that time; that thereafter his winnings were negligible; that he tried to continue his unlawful course by the use of a different gambling device, but that it failed to entice a sufficient number of victims to make it profitable; that appellee continued to play his game and made a profit. He then urges upon the court the conclusion from these facts that if he had been allowed to continue the commission of his crime, viz, carrying on his gambling game, he would have continued the same rate of earnings during the term of the injunction, and would have reaped a net profit from his crime to the amount of \$13,650. That appellee having made profits from the conduct of his game, it must be presumed that \$13,650.00 of those profits represents appellant's losses and were gains made by appellee out of appellant's business, and that, therefore, appellee must divide with the appellant the proceeds of the gambling game on the theory that he holds the profits or proceeds of an unlawful and criminal enterprise as a trustee *ex maleficio* for his account.

This is a fair and accurate statement of the facts and of the argument. It seems to us that the law speaks for itself out of these facts. *It is self*

*evident that appellant goes back to—indeed must go back to—and prove his unlawful and criminal activities as the very foundation of his claim. Next he must prove that he intended to continue his gambling operations. He must prove that his only loss is the loss of the winnings from his games. He must prove that we conducted a gambling game, and made profits by way of winnings. He must prove—and therein he utterly fails—that part of our winnings were made up of his losses. So, throughout his brief the unlawful and criminal enterprise is the thing, and without it he cannot move a step. It meets him at every turn. He must prove it and rely upon it as the foundation of his recovery. Without it he has no possible claim, because there could then be no loss. His loss grows out of a prohibition against a crime. The arguments in *Armstrong vs. Toler* and *McMullan vs. Hoffman* are conclusive of this case. Appellant endeavors to distinguish the principle in *McMullan vs. Hoffman* from the principle underlying this case, and pretends to find some such distinction noted by Justice Peckham in discussing the case of *Brooks vs. Martin* in its relation to *McMullan vs. Hoffman*. But as above shown the facts in *Brooks vs. Martin* are not parallel with those of the case at bar, and of the *Brooks* case Justice Peckham said:*

“We simply say that taking that case into due and fair consideration, we will not extend its authority as law beyond the facts therein

stated. We think it should not control the decision of the case now before us."

It is, therefore, apparent that the court did not attempt to make a distinction of principle between an unlawful enterprise relating to a municipality and an unlawful enterprise relating solely to private individuals. We submit there is no distinction in principle and any attempt to make such a distinction must be sophistical and illogical. We, therefore, confidently affirm that the case of *McMullan vs. Hoffman*, the entire theory thereof and the principle upon which it is decided, become determinative of the case at bar.

Appellant cites a number of cases in support of a proposition which he quotes from *Fuller vs. Berg*, 120 Fed. 274, as follows:

"Equity is not concerned with the general morals of complainant; but with the tort that is regarded as most affecting the particular right asserted in the suit. If the defendant can do no more than show the appellant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offense to other forums."

It is not necessary to discuss the soundness of the proposition as an abstract statement of the law, but we may say that we believe the case from which

it is quoted was not well decided, and that the dissenting opinion of Judge Grosseup states the law as it should have been interpreted and applied. But, however, that may be, neither the case itself, nor the quotation can afford any support to appellant's proposition under the facts in the instant case. In connection with said *Berger* case, we desire briefly to examine some of the other cases cited by counsel, upon the authority of which he seeks to avoid the force of the fact that the money he seeks to recover is anticipated profits of a criminal enterprise. The citations we examine are as follows:

Board of Trade vs. Kinsey, 130 Fed. 507.

The only question in that case was whether the Board of Trade, which sometimes permitted gambling on its Exchange, could go into a court of equity for the protection of its property right in market quotations based on transactions of its exchange, which had news value entirely independent of the exchange transactions. The court held that it could not deny relief on the ground of general immorality of the complainant not affecting the particular right asserted in the suit. That is, it sought to enjoin the defendants from purloining its market quotations and the court in substance held that the mere fact that the exchange permitted gambling in futures did not preclude it from enforcing a property right that was wholly independent and distinct from the gambling transactions which it permitted.

In the case of *Mills vs. Industrial Novelty Co.*, 230 Fed. 463, the question was whether a patentee was entitled to an injunction restraining an infringement of his invention where it appeared that it was being used by a licensee as one of the elements or factors in a gambling device, manufactured by the licensee and sold upon the market. The court held that the invention was innocent in itself, and because someone made an unlawful use of it, was no reason why the complainant was not entitled to relief. In this connection we might call the court's attention to the fact that playing cards and dice are the two most generally used gambling instruments within common knowledge. Yet they are capable of being used, and are used, for innocent amusements. Because of the unlawful use to which they are so largely put, could a manufacturer or vendor, who sought recovery for the purchase price of such articles, be defeated by allegation and proof that they were implements most commonly used for gambling purposes? It must be apparent that the case is not relevant to the matter here in suit. He cites the case of *Talbott vs. Independent Order of Owls*, 220 Fed. 660. This was a suit by one fraternal organization against another organization, to enjoin the use of its name and emblem. The court said:

“Nor does the evidence which is found in this record, upon which the defendants rely to defeat the plaintiffs and to bring this suit under the ban of the principle ‘he who comes into equity must come with clean hands,’ sustain

that defense. That principle does not repel all sinners from *the precincts* of courts of equity, nor does it *disqualify* any plaintiff from obtaining full relief there, who has not done iniquity in the transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays."

It is obvious that Harbaugh has done iniquity in the case at bar in the very transaction concerning which he complains. It is the anticipated profits of an intended crime that he seeks. The illegality which is shown in this case does have an immediate and necessary relation to the alleged equity for the enforcement of which he prays. The illegal and criminal act is the sole foundation for his claim.

Gilbert vs. Amer. Surety Co., 121 Fed. 499, is cited. We need but state the syllabus to understand how foreign the case is to any matter here in controversy:

"Where a contract for the sale of personal property was fully executed by the payment of the consideration and the delivery of the property, which was then turned over to the seller as agent and employe of the purchaser, and held by him for three years in such capacity, he cannot thereafter claim such property as his own against the purchaser on the ground that the sale was made in furtherance of a combination in restraint of trade, and was therefore void as

against public policy, since he is estopped to deny the title of his employer for whom he holds the property in trust."

In *Brown vs. Gold*, 80 Fed. 564, the facts were that:

"A. agreed to give credit to B., who was financially embarrassed, in consideration of a deed of trust made by B., which, for business reasons, was executed to C., a clerk of A. In a suit to enforce the trust, held, that the defense that complainant did not come into equity with clean hands had no application, there being nothing illegitimate in the transaction; and that, in any event, the maxim could not be invoked by B., who had received the benefit of the transaction."

City of Santa Cruz vs. Wykes, 202 Fed. 357, is a case involving only the question of *ultra vires* arising out of the purchase by a municipal corporation of water works and the issuance of bonds and a mortgage to the vendee in payment therefor. It was held in the case that the action of the Municipality was not *ultra vires* in the broad acceptation of the term, but only in so far as the contract at the time exceeded in amount the limit the law placed upon it, and that after having received the property and having reached a position where it had authority to become obligated for the full amount, the contract could not be repudiated. Now this brief review of these cases shows what an imagination one

must have in order to get any satisfactory aid out of them in solving the questions in the pending case.

II.

Our second point is that the evidence discloses such willful and flagrant violation of the injunctive order, both in letter and spirit, as to justify the court in refusing recovery upon the injunction bond. A willful violation of an injunctive order ought to be a good defense to an action upon an injunction bond, though there are cases to the contrary. Now, in the case at bar, the appellant admits that he took in—that is to say, received—from the operation of his gambling devices the sum of \$11,266.00 subsequent to the issuance of the injunction. See testimony of Harbaugh (T. R. 131).

It is true that he says most of the amount taken came from orders for gambling devices placed previous to the issuance of the injunction, but he did place machines after the injunction. The evidence shows that the machines were placed with customers at the price of \$150.00; that the purchase price was not to be accounted for or paid to Harbaugh except as the money was received by the customer from the play of those who sought to win the prizes. So that, throughout the period the injunction was in force, the appellant's gambling machines in large numbers were permitted by him to continue in operation in the hands of his customers, and to produce for him in the face of the injunctive order large

winnings which were paid to him from time to time during the period the injunction was in force by reason of the continued operation of these gambling devices in defiance of the injunction.

It will not do to say that he placed no new devices in operation during the time the injunction was in force, but merely continued to operate or permit the operation of those machines he had put out prior thereto. For it is evident that by continuing gambling with machines already placed and inducing play upon them by the prizes offered, he did continue the business that was prohibited by the injunction and not only in spirit, but in letter as well, violated the express terms of the injunctive order. Such being the case, he is in no position now to demand relief at the hands of this court. The question of damages is largely discretionary with the trial court. Judge Bean has held both as a matter of fact and of law that Harbaugh is not entitled to recover; this finding of fact supersedes that of the Master and is entitled to great weight.

III.

The evidence offered in support of Appellant's claim is wholly insufficient to authorize any award, because the same is so uncertain, speculative and problematical in character that it affords no reasonable basis for computation; and furthermore appellant has wholly failed to show by any evidence what-

ever that any of the business which appellant claims to have lost came to appellee. Harbaugh testified that with his new box, Ex. 7, he was able to handle all the business he could get (T. R. 90). *There is in the record no scintilla of evidence that the appellee did business with any existing or prospective customer of the appellant, nor that he received as a result of his operations a single dollar that would otherwise have gone to appellant.* We refer to the latter part of our statement of the case for a resume of the evidence on this point.

The Master sought to justify his award upon the following theory:

“It has long been the rule that for infringement of patent rights the plaintiff is entitled to recover the amount of gains and profits that the defendant has made by his unlawful use of plaintiff’s invention; *Tilgham vs. Proctor*, 125 U. S. 136-145; *Westinghouse Company vs. Wagner Company*, 225 U. S. 604-618.

“These and the cases therein cited proceed upon the theory that the infringer by reason of his wrong has received funds in the nature of gains and profits which in equity belong to the patentee. In the present case the situation is reversed. We have two people enjoying a monopoly of the business, each claiming under separate patents. The plaintiff by use of a restraining order unlawfully bars the defendant, his competitor, from the field, and thereby obtains profits, which otherwise would have been

the defendant's. A question arises as to whether or not the rule invoked in the cases above mentioned applies in a suit disclosing the fact last described.

“There does not seem to be any good reason why it should not, unless the fact that these funds arose from the use of a gambling device bars any recovery whatsoever.”

And he thereupon makes the following finding:

“That the fact that the device is a gambling device does not bar the defendant, Harbaugh, from recovering any profits which Dwyer obtained by reason of the restraining order and that as to those profits Dwyer is in the position of a trustee *ex maleficio*.”

The defendant's entire case is predicated upon this theory. We earnestly submit that the Master erred in so finding, for the simple reason that the theory adopted by him is based upon a rule that only applies when a patentee is allowed profits and damages from an infringer. This rule is authorized by the provisions of an express statute, to-wit:

“Upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover in addition to the profits to be accounted for by defendant, the damages the complainant has sustained thereby.”

(Section 4921, R. S.)

The case at bar does not come within the rule.

As already indicated, the liability referred to by the Master is a statutory right, whereas the liability in this case, if any there be, is found to exist and have its origin in the provisions of the bond, which Judge Wolverton required as a condition precedent to the granting of a preliminary injunction. In that particular, Judge Wolverton was vested with absolute discretion. He could have granted the injunction without a bond, in which event, upon the dissolution thereof, there would have been no possible recovery. *Russell vs. Farley*, 105 U. S. 433; *Scheck vs. Kelly*, 95 Fed. 941; *Myers vs. Black*, 120 U. S. 206.

Here, then, plaintiff's liability, if any, arose, not by reason of any statute, but by reason of the provisions of the bond required by Judge Wolverton, which was limited to the sum of \$10,000.00 "to secure the payment of any damages which might be awarded."

So it must be plain that it was not up to the plaintiff to account, as he would have been required to do had he been the infringer, but it was incumbent upon the defendant to prove his damages, and in doing so, he was confronted with his own assertion that the device is a gambling device; that he used it for no other purpose and that every cent of profit that would have been derived therefrom would have been the result of gambling in violation of the law. On the other hand, in the case of the patentee referred to in the Master's report, such patentee is

automatically vested with title to any profits made, in which case the infringer is held to be a trustee, and he must account therefor.

This distinction is so apparent that we felt entirely justified in looking to the defendant to make his proof of damages. This he could not do, and as a last resort the Master erroneously invoked the assistance of the above statutory rule and held that Dwyer should have proven that he did not profit instead of requiring Harbaugh to prove that he had been damaged and that we had received what he claimed to have lost. This seems to us a new rule of evidence. It is for a plaintiff to prove the basis of his recovery, not for a defendant to prove that his adversary is not entitled to recover. The whole theory of the law is affirmative and a party is nowhere required to prove a negative in the first instance.

In addition to the authorities already cited upon this question, we beg leave to submit the case of *Central Coal & Coke Co. vs. Hartment*, 111 Fed. 876 (8th Circuit), which we believe is squarely in point. The following are the head notes:

“Only actual damages established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable. Speculative, remote or contingent damages cannot form the basis of a lawful judgment.

“The estimates, speculations, or conjectures or witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury.

“The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule that the loss of profits from the interruption of an established business may be recoverable where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was.

“Proof of the expenses of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.”

The following elements which enter into this case, we believe, plainly bring the same within the general rule, prohibiting the awarding of anticipatory profits because they are in their nature too remote, speculative and uncertain to warrant a judgment for their loss.

“(1) The business depended upon the exploitation of a gambling device, thereby involving the constant danger of police interference;

“(2) The gambling device was in the nature of a novelty which depended for its support upon the changing whims of the players; the extent of the support was measured by the duration of the novelty;

“(3) The defendant had no established business to point to; it had just been started, and the field of operation was limited;

“(4) The defendant had no provable facts. The records produced were not books of original entry, and were incorrect, incomplete and altered. The records of original entry such as cash books showing daily receipts of cash; the express book, showing the daily shipments of merchandise, together with check accounts, vouchers, etc., were destroyed or suppressed.”

We believe the evidence in the record conclusively supports the above statements. On page 107, T. R., we find a portion of the testimony of Louis Rubenstein, a witness on behalf of the defendants, as follows:

“In some cases when I came into the office I was told that a certain party would not have another one of those outfits because of police interference. I came in contact with that objection right from the start, when I began operating with the General Novelty in the Fall of 1918. In some places they continued right along.”

Page 108 discloses numerous conflicts with the police and at the bottom of the page he says:

"I could not tell at any time when the police would step in and interfere with the operation of these boxes. That is a chance that I was always taking with my business in every town I went to in the State of Washington and in every town in the State of Oregon. That was the chance I had to get any business—whether or not the merchants would care to risk the chance of police interference."

The testimony continues to the same effect on page 109. Again on page 111 Rubenstein continues:

"It depended on how the town was moving, whether there was any work going on for those loggers, or other people who attend these places—or whether the police let the matter be without interference. The merchants with whom I ordinarily deposited these boxes were cigar stores, candy stores, soft drink houses. A great many of them soft drink houses and pool rooms, where there were boys hanging around. It depends upon the boys that hang around these places that spend the money. These boys didn't expect to buy a collar button for a nickel; they expected to get something big—a camera, for instance. A fellow would keep on pulling these tickets until he struck something big before he quit."

Again at the bottom of pages 130 and 131 is the testimony of Paul C. Harbaugh, which we have heretofore quoted, and which discloses the impossibility of arriving at any definite opinion as to what amount of income might continue to be received from the operation of these devices.

On page 157 Harbaugh again testified when recalled as a witness on his own behalf:

“Police interference occurred from the very beginning,—was spasmodic. Notwithstanding such interference I did the business which I have testified to prior to the time of my being enjoined.”

Further on page 158 he testified that his papers and records were in such bad order and so many of them lost, that the fair conclusion is that he was unable to arrive at any reasonable statement of his business.

We quote on page 180 from the testimony of J. F. Dwyer:

“It also depends upon the sporting instincts of the people who play this device. It also depends upon the business condition of the vicinity and the business getting ability of the dealer where this device is placed. It also depends upon the general business conditions, whether the town is so-called open or closed—whether the fellows in the town have to patronize pool halls and card rooms or not, and where the device is placed in the town. In other words, whether they have the money to take a chance.”

He further states at the bottom of page 181:

“I was still in business just as usual as theretofore and I was subject to the same police

- interference. When I had interference in one place, by the police, I immediately went into another.”

So it appears that our conclusions as to the speculative and uncertain character of the evidence upon which the amount of anticipatory profits is based are wholly justified and supported by the record.

IV.

If the appellant is entitled to recover at all by reason of the injunction issued in this case, such recovery cannot exceed the amount of the injunction bond, or the amount of the deposit made in lieu of a bond, as a condition for the issuance of the injunction. Such is the uniform rule, and for this reason: The grant or refusal of an injunction is wholly discretionary with the court, and in the absence of express statute it is likewise discretionary whether when granting an injunction the court shall require a bond or not. If no bond is required, then no damages are recoverable upon the dissolution of the injunction for the grant of the writ or injunctive order is a judicial act, and any damage flowing therefrom is *damnum absque in juria*. If, in the exercise of discretion, the court requires a bond or security, it follows, of course, that the recovery is limited to such bond or security, for the amount thereof depends upon the discretion of the court exercised judicially and thereby the court itself

measures the utmost limit of the legal injury to the party against whom the writ may run. The United States courts have had occasion to pass upon this particular question on several occasions, and the court's attention is directed to the following case:

Scheck vs. Kelly, 95 Fed. 941.

Syllabus:

“Where an injunction has been granted without bond, and subsequently the injunction is dissolved and the bill dismissed, no action will lie at the instance of the defendant against the plaintiff in the injunction suit for damages sustained by reason of the issuance of said injunction.”

In that case the court quotes with approval from the opinion of the Supreme Court of Missouri in the case of the *City of St. Louis vs. St. Louis Gas Light Company*, 82 Mo. 354, where it is said:

“It seems that without some security given before the granting of an injunctive order or without some order of the court, or a judge requiring some act on the part of the plaintiff which is equivalent to the giving of security, such as a deposit of money in court, the defendant has no remedy for damages which he may sustain from the issuing of the injunction unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution.”

The court also cites:

Russell vs. Farley, 105 U. S. 433;

Lawton vs. Green, 64 N. Y. 326;

Hayden vs. Keith, 20 N. W. 195 (Minn.).

Again in the case of *Cimiotti Unhairing Co. et al. vs. American Fur Refining Co. et al.*, 158 Fed. 171, it is held:

“There is no statute or rule restricting the discretion of a Federal Court in fixing the amount of an injunction bond or in imposing terms as a condition of granting an injunction, and in the absence of such statute or rule where the court in its discretion has fixed the amount of such bond, which has been given, the liability of the complainant is limited to the amount thereof, which covers everything, including both damages and costs.”

In that case the court required a bond of \$15,000 as a condition to the issuance of the injunction. Upon the dissolution of the injunction the matter was referred to a Master to assess the damages and he reported \$18,406.70. Upon exceptions to the report Lanning, District Judge, said:

“As the court has discretionary power to grant an injunction without bond, it has discretionary power to fix the amount of the bond in case one is required. When a bond is given its penal sum is notice to the applicant for injunction of the maximum risk he must assume if the injunction be issued. He cannot be required to assume a burden greater than that which the

Chancellor, in the exercise of his discretion, has imposed.”

The Court thereupon fixed the amount of recovery at the penal sum of the bond, viz: \$15,000, notwithstanding the Master's assessment of \$18,406.70. That case went on appeal to the Court of Appeals for the Third Circuit, 168 Fed. 529, and the Court after a careful and exhaustive examination of the question held:

“Where a Federal court as a condition to the granting of a preliminary injunction required complainant to give bond in a stated sum, to indemnify the defendant against loss or injury due to the improvident or erroneous granting of such injunction, the liability of the complainant as well as the surety is limited to the amount of such bond and neither further damages, interest nor costs can be awarded in addition thereto.”

The defendant contended it was entitled to recover the entire amount of its loss and damage, but the court said:

“We cannot agree that the requirements of a bond for \$15,000 was merely a provision for collateral security for the fulfillment of an obligation—implied if not express—to indemnify generally and without limitation.”

It was further said by the court that they had been unable to find any case where a recovery was allowed in excess of the amount of the bond.

The Court then quotes from:

Myers vs. Block, and

Myers vs. Isaacs, 120 U. S. 206.

“This cannot be done in the United States courts. Without a bond no damages can be recovered at all. Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs unless he can make out a case of malicious prosecution. *It is only by reason of the bond and upon the bond that he can recover anything.*”

The Court proceeds then with its own opinion, as follows:

“In our opinion, however, the Court below was clearly right in not adding interest or costs to the sum named in the injunction bond. It limited the total liability for interest, as well as principal, to \$15,000, and even a court of equity, whose discretion as to costs is generally controlling, would, we think, exceed its authority if as to proceedings taken under such a provision, it ordered payment of costs to either party. As was said by Mr. Justice Bradley, *supra* (*Myers vs. Block*), it is only by reason of the bond that a party against whom an injunction wrongfully issues can recover anything, and therefore, it is difficult to see how the claim of the defendant for interest and costs not nominated in the bond could possibly have been allowed.”

The decree of the Circuit Court was therefore affirmed.

Doyle vs. Sandpoint, 18 Idaho, 654 (112 Pac. 104) ; (note to 32 L. R. A. N. S. 34).

We feel entire confidence in the accuracy and soundness of each of our several propositions, viz:

First: That anticipated profits arising out of the commission of a crime are not recoverable in a court of equity nor in any other judicial tribunal.

Second. That a flagrant violation both of the spirit and letter of an injunctive order is sufficient ground for the court to exercise its discretion against the allowance of damages.

Third. That the evidence offered by appellant in support of his claim of damages is all of it of such a speculative, problematical, remote and uncertain nature that it affords no basis for computation of lost profits, and there being no evidence of any gains made by appellee, there is in fact no competent evidence upon which any judgment for damages can rest.

Fourth. That in all events appellant could not recover any amount in excess of the sum stipulated in the bond.

It seems certain, therefore, that the decree

herein must be affirmed and we submit the cause to the court with confidence.

JOHN W. ROBERTS and
E. L. SKEEL,

Solicitors for Appellee.

FRANK A. STEELE, *of Counsel.*

No. 3946

United States Circuit Court of Appeals for the Ninth Circuit

PAUL HARBAUGH,	}
vs.	
JOSEPH F. DWYER,	
	Appellant,
	Appellee.

APPELLANT'S PETITION FOR REHEARING

T. J. GEISLER,
Counsel for Appellant.

FILED

JUN 14 1923

R. D. MONTGOMERY,
CLERK.

IN

United States Circuit Court of Appeals for the Ninth Circuit

PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

No. 3946.

APPELLANT'S PETITION FOR REHEARING

APPELLANT'S PETITION FOR REHEARING

The appellant prays for a rehearing of this appeal on the following grounds:

The lower court, in deciding that appellant's theory as to his right to recover is wrong, passed only on one phase of the whole case presented by the facts certified by the Master's report; and, it is submitted this Court

will dispose of all vital questions arising on the record, according to the principles of equity and justice.

The doctrine under which the lower court refused appellant any damages was *public policy*. This doctrine, of course, is not applied for the benefit of Appellee, but through him for the public.

But a fundamental principle is:

"The Court should vindicate the integrity of its process" (Townsend vs. Smith, 3 N. W. 439; 47 Wis. 623) and not permit a party to maliciously abuse the same.

And relief will be given where the ends of public policy will be promoted by so doing, not for the benefit of the party but through him for the public; thus protecting the public against the abusive use of the process of its courts.

Wright vs. Stewart, 130 Fed. 905, 921 (Affirmed 147 Fed. 321 C. C. A. 8th); Meech v. Lee, 82 Mich. 274, 46 N. W. 383, 400.

In the case at bar the Master's report shows that *Appellee acted in bad faith* in the premises; *he was guilty of the malicious abuse of the process of injunction* for the purpose of *stifling his only competitor*, and in that way getting for himself the fruits of a monopoly. No similar case is to be found in the books; at least has not been presented upon a challenge of the Appellee to do so; nor could it be found upon diligent search by Appellant. That is to say *no case is to be found where*

the doctrine of public policy was applied in favor of that one of two parties, who in addition to being guilty of the illegal act chargeable to both, was further guilty of the malicious abuse of the process of the court, in order that he might—and thereby did—fill his own pockets.

Equity is not limited to *negative* action in giving effect to the doctrine of public policy, but in a proper case will act *positively* also. *Public Policy is promoted by discouraging all forms of fraud.* Bath Gas Light Co. v. Claff. 151 N. Y. 24.

As said in Wright v. Stewart, Supra “*Where the ends of the public policy will rather be promoted by giving than refusing relief, the courts prefer the former.*”

1 Cooley on Torts (3rd Ed.) P. 357 it is said that

“No one shall derive advantage from the abuse of the process of the court, or by his fraud or misconduct.”

In Antchiff v. June 81 Mich. 492; 10 L. R. A. 621 the court, citing Cooley on Torts, said if process is wilfully made use of for a purpose not justified by the law, this is a malicious abuse of process. See also Savage v. Brewer, 16 Pick (Mass.) 453; 28 Am. Dec. 255, in which the court quoted from Sinclair v. Eldred 4 Tort, 7, Lord Mansfield as saying: “I remember not a few gross abuses of the legal processes which in various forms have been subjected to judicial investigation; and we must take care that the evil should not be suffered

to increase by any laxity in the administration of justice.”

“Instances are not wanting where patentees make illicit use of the courts as instruments of oppression.” *Acetylene Co. v. Avery Co.*, 152 Fed. 642, 645.

In 1 Street’s foundation of Liability P. 334 it is said “*In whatever sense malice is necessary (in seeking retribution for the apparent abuse of process) the element will be inferred from the advertent doing of harm*”. In brief, “if process, either civil or criminal, is wrongfully made use of for a purpose not justified by the law, this is classified as a *malicious abuse* of process”. (1 Cooley on Torts 3rd Ed. P. 354.)

In the case at bar malice on the part of Appellee in suing out his injunction is specifically shown. The record shows he made material assertions about his patent which he knew were not true. The Master found that Appellee was not acting in good faith in obtaining his injunction (Trans. 42). Thus the burden rested heavily on Appellee to make some satisfactory explanation of his conduct (*Savage v. Brewer*, 16 Pick Mass. 453). Yet he offered no extenuating circumstances, even though called by Appellant, and cross examined by his own counsel. (Trans. 178.)

Apparently this Court took Appellee’s conduct into consideration, for it said “it is to be regretted that the Appellee has profited by an abuse of the process of the court.” But the court was of the belief that the appel-

lant was in a measure responsible for such miscarriage of justice; it said "had (appellant) interposed the defense of illegality at the threshold of the case, no doubt the injunctive relief would have been with-held."

But Appellant in reply begs to plead that he was not guilty of any negligence in asserting his defenses.

In the Court below Appellee asserted that *whatever use* to which he put his patented device, *such fact is immaterial*, and cited *Mills v. Ind. Nov. Co.*, 230 Fed. 463, in support of his position. In that case "The answer specifically alleged that the only use to which device was put was for *gambling* purposes, and therefore plaintiff had no standing in a court of equity. The plaintiff moved to strike this paragraph from the answer and the motion was granted. The defendant made a counter motion by which it sought to amend by alleging further that the patented device was "*incapable* of any other use; that the profits, if any, derived by defendant from the alleged infringement complained of are profits made in violation of public policy and good morals and are of such character that plaintiff can have no right to recover the same; but the court denied such motion also, saying:

"Granting there is a valid patent in the case the defendants are not concerned with the particular use which the plaintiff makes of his monopoly"; and the court cited *Fuller v. Berger*, 120 Fed. 274, C. C. A. 7th Cir. 1903, reversing the decree of the lower court refusing an injunction on the same ground. A petition for the

certiorari was denied in the last mentioned case, 193 U. S. 669, 48 L. Ed. 839.

And note also the view point of the trial court when Appellant tried to show the character of Appellee's device. The trial court held that to be *immaterial* and sustained Appellant's objection (Trans. p. 75).

In this Court Appellee in his brief took the position that the very rule of law which he urged in his favor in the Court below and on which he secured his injunction was wrong; not because of any latter decision but because wrong in principle; thus showing that Appellee is juggling his case in court.

Whatever this court may deem to be the correct rule of law, the question so presented had not been passed in this Circuit, and Appellant was compelled to accept the doctrine of said cases.

In the next place the character of the device on which Appellee's alleged patent was granted is manifest from an inspection of the drawings of the patent, and the device itself. That was the observation of the Supreme Court of Washington in passing on appellee's device. That court condemned it, because it intended to appeal to * * * the gambling instinct * * *, of getting "something for nothing". *Dwyer v. Seattle*, 199 Pac. 740-741.

Until such decision by the Supreme Court—July 28, 1921—several months after the patent case had been tried and decided the device stood adjudged as being lawful by the decrees of the Superior Court of Wash-

ington; and Appellee asserted in the court below that the devices were lawful.

The character of the devices was wholly ancillary to the question to be determined.

The decision of the District Court in the injunction suit was primarily based upon the fact that Appellee's "patent if valid at all is a very narrow one, consisting of but a slight improvement in the art"; and that there was no infringement by Appellant (Trans. 26). The opinion shows that *Appellee was trying to recover on claims rejected and canceled in the Patent Office*, and had full personal knowledge of all these facts; thus, in brief, Appellee knew when he brought the suit that his charge of infringement was wholly without cause; and, as mentioned, the Master found that he *was not acting in good faith*.

Applicant's petition for his order of reference specifically alleged appellee's said wrongful acts. Appellee took an appeal from the decree of dismissal of the District Court and assigned as one alleged error the granting of said order of reference. Pending the time for perfecting Appellee's appeal the injunctive decree of the Seattle Superior Court was reversed and said device was declared to be illegal. Then Appellee abandoned his said appeal, without disclosing his reason, and Appellant proceeded to take testimony before the Master. In so doing Appellant expended a large sum of money; this might have been avoided had the questions presented by Appellee's appeal been determined. In short Appellee by abandoning his said appeal induced

Appellant to proceed in said reference and thus to incur great trouble and expense.

Appellant submits that he has had to bear more than his transgression merits; had even to give heavy bonds in the court below in order to maintain, during this appeal, the security given on the wrongful injunction; and may now even be subjected to a claim of damage on the part of the Appellee. On the other ⁿ had the acts of Appellee, the greater transgressor, the malicious abuser of the solemn process of injunction for ulterior purposes, have, seemingly, been overlooked at every stage of this case.

During the whole time that Appellant operated his devices their legality was still recognized by the courts before whom they came. Appellant was within his rights in using his own invention (*Smith v. Nichols*, 21 Wall; 88 U. S. 112; 22 L. Ed. 566); was accountable only for any infraction of the law, and for that he was answerable only to the tribunals who had jurisdiction of such matters.

The malicious abuse of Appellee of the process of injunction, for ulterior purposes, being confessed, it would seem that, *under the doctrine of public policy, Appellee should be subjected to some discipline in the premises, and that the principle*—"shall a wrong doer be permitted to profit by his own wrong," is issued as a challenge by the record

The comment of De Grey Ch. J. in *Jaques v. Golithly* 96 Eng. Rpts. Reprint P. 632, is applicable:

Appellee though a self confessed transgressor (and an abuser of process) is seeking the favor of the court; he says that the transactions of the parties in the premises were illegal, and therefore he has *scruples* in conscience to pay any damages; but he has *no scruples* in conscience to retain the *benefits* of his own wrongful and malicious acts. In *Jones v. Bartley*, 99 Eng. Rpts. reprint, 434, 444, Lord Mansfield remarks "No man will venture to take if he knows he is liable to refund."

It is submitted that the grave question arising on the facts here presented should have the further consideration and adjudication of this august Court, for the guidance and vindication of the community, and the preservation of the integrity of the Court's process.

Therefore it is prayed that this petition be allowed.

Respectfully submitted,

T. J. GEISLER,
Attorney for Appellant.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Of Counsel for Appellant

United States
Circuit Court of Appeals ^v
For the Ninth Circuit.

J. BILBOA and WILLIAM BORDA,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED
JAN 11 1923
F. D. MONGKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. BILBOA and WILLIAM BORDA,
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Names and Addresses of Attorneys of Record.

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For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United
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Reno, Nevada, and Mr. CHARLES A. CANT-
WELL, Assistant United States Attorney for
District of Nevada, Reno, Nevada,

For the Defendant in Error. [1*]

*Page-number appearing at foot of page of original Certified
Transcript of Record.

United States of America, District of SS. Division

No. 246
THE UNITED STATES OF AMERICA
vs.
William Borda
J. Bilbas

FEES OF U. S. COMMISSIONER.
(See Act of May 28, 1896.)

-Drawing complaint, with oath and jurat to same, 50c.
-Copy of complaint, with certificate to same, 30c.
-Issuing warrant of arrest, 75c; Enforcing same, 15c.
-Issuing subpoena or subpoenas in said cases, 50c; with fee for each of witnesses in addition to the first, 15c.
-Drawing temporary bond of defendant and sureties, taking acknowledgment of same, and justification of sureties, 15c.
-Issuing temporary commitment and making copy of same, 50c.
-Administering oath to U. S. witnesses for defendant, and taking same, 10c. each.
-Hearing and deciding on criminal charges on the day of testimony to writing when required by law, 50c; order of court, per diem, \$5.00.
-Same, for one additional day on the day of testimony, 50c.
-Drawing final bond of defendant and sureties, taking acknowledgment of same, and justification of sureties, 15c.
-Issuing final commitment and making copy of same, 50c.
-Recognition of all witnesses in final commitment, 15c.
-Oath to U. S. witnesses as to attendance and travel, 5c. each.
-Order in duplicate to pay first witness, to U. S., 30c., and 5c. for each of additional U. S. witnesses.
-Transfer of proceed, required by order of court, and transim of original papers to court, 50c.
-Copy of warrant of arrest, with certificate to same, when defendant is held for court and original papers are not sent to court, 15c.
-Examination and certificate under Section 1063, Act of October 3, 1917, connected therewith (date of commitment to serve sentence, 19__.
-Imprisonment named in sentence, amount of fine and costs, \$_____, \$3.00.

Fees of Witnesses, Guards, etc. (name of each)

50 Before me, P. B. Ellis
a United States Commissioner for said District, complaint and affidavit was made—warrant and certified copy of complaint was presented—on this 20 day of March, 1922, by
H. P. Brown
charging in substance that on or about the 19th day of March, 1922, at Gardnerville in said District, the defendant, in violation of Section 3 Title 11 Chapter N.P., Act of the Revised Statutes of the United States Penal Code, did unlawfully have illicit liquor in their possession
Complaint approved by the U. S. District Attorney on 19, 19__
On 19, 19__, issued warrant to U. S. Marshal,
On 19, 19__, warrant returned, indorsed as follows:
"Received this warrant on the 19 day of 19, 19__, at named and executed the same by arresting the within named at on the 19 day of 19, 19__, and have h now in court, as within I am commanded." U. S. Marshal
District of U. S. Marshal
By Deputy.

75 On 19, 19__, issued subpoena for the following witnesses in behalf of U. S.:
On 19, 19__, said subpoena was returned, indorsed as follows:
"Received this writ 19, and on or before 19, served the same on the within named by leaving a certified copy thereof with each of them personally; and on the within named
by leaving such copy at the usual place of residence of each of them. The other person—within named not found.
District of U. S. Marshal
By Deputy.
On 19, 19__, issued subpoena for the following witnesses in behalf of U. S. (or) defendant:

On 19, 19__, said subpoena was returned, indorsed as follows:
"Received this writ 19, and on or before 19, served the same on the within named
by leaving a certified copy thereof with each of them personally; and on the within named
by leaving such copy at the usual place of residence of each of them. The other person—within named not found.

District of U. S. Marshal
By Deputy.
On March 20, 1922 defendant was brought before me, the said United States Commissioner, at my office, in the in said District, by J. P. Rodrin Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendant, who thereupon, for plea, said he is "guilty" as charged in said complaint.

G. L. Frick appeared for the U. S.
appeared for defendant

Search-Warrant.

The President of the United States of America:
To the Federal Prohibition Director for Nevada, and to His Deputies, or Any or Either of Them: GREETING:

WHEREAS, P. Nash has heretofore, to wit, on the 18th day of March, 1922, filed with me Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit in which he states that he is a Federal Prohibition Agent for Nevada; that he has knowledge and information that in and upon those certain premises & persons described as follows, to wit: Premises known as the French Hotel situated in the town of Gardnerville, Douglas County, State of Nevada, operated by one Borda, John Doe and Richard Roe, said premises to cover the bar-room, back rooms, kitchen, pantry, cupboards, lockers, safes, cellars, attics, outbuildings and the persons of the proprietors, employees and occupants thereof; there is possessed, concealed, kept, stored, sold and bartered, intoxicating liquor containing one-half of one per centum or more of alcohol by volume for beverage use, in violation of the National Prohibition Act; that it will be necessary to search the above-described premises and persons in order to obtain for the United States of America the said intoxicating liquor and all property used in the unlawful sale, concealment or destruction of the same, and that it will be impossible to make the said search without

the aid and use of a search-warrant; whereupon affiant prays that a search-warrant issue covering the above-described premises and persons.

That affiant sets forth in his affidavit as the particular grounds or probable cause for the issuance of a search-warrant the following facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant, to wit: That affiant has been informed by John Doe, whose true name has been given to the commissioner, that said informant purchased liquor in the said premises from the proprietor, said purchase being made since the 6th day of March, 1922. Affiant and other agents have investigated said premises and have seen persons coming away therefrom in an intoxicated condition, and from the said facts, circumstances and conditions I find that probable cause has been established for the issuance of a search-warrant as prayed for.

NOW, THEREFORE, pursuant to Section 25, Title II of the said National Prohibition Act, you are hereby commanded and directed to enter the above-described premises in the daytime or nighttime and each and every building on said premises and there to search the same and said persons for the above-mentioned intoxicating liquor so possessed, concealed, kept and stored in violation of the National Prohibition Act, and any property used in the unlawful sale, concealment or destruction thereof and seize and take the same into your possession and bring the same before me to the end that the said liquor and property may be dealt with according to

law, and to make due return hereof, with a written inventory of the liquor and property taken by you, or either of you, without delay.

WITNESS my hand this 18th day of March, 1922.

[Seal]

ANNA M. WARREN,
United States Commissioner.

[Endorsed]: Make return on within warrant as follows: Schd. premises as described within Mch. 19-12:15 A. M. Seized as evidence 1-Bottle containing wine from drain-board of Bar, 1-Bottle containing Liquor from floor behind bar, 1-glass on Bar, 1-Bottle Lashe's Bitters, 2-Bottles Hoffman's Tonic. I, H. P. Brown the officer who served the within warrant hereby certify on oath that the above inventory represents all the property taken under the warrant. H. P. Brown, Fed. Pro. Agt. Subscribed and sworn to before me this 20th March, 1921. P. B. Ellis, U. S. Commissioner. Filed Mar. 28, 1922, E. O. Patterson, Clerk U. S. Dist. Court, Dist. Nevada. By O. E. Benham, Deputy Clerk.
[3]

Affidavit of P. B. Ellis, United States Commissioner.

United States of America,
District of Nevada,
Division,—ss.

Before me, P. B. Ellis, a United States Commissioner for the District of Nevada, ——— Division, personally appeared this day H. P. Brown, who being first duly sworn, deposes and says that on or about the 19th day of March, A. D. 1922, At Gardnerville, Douglas County, in said District,

William Borda and J. Bilbas, in violation of N. P. Act of the Revised Statutes of the United States, did unlawfully, knowingly and willfully have in their possession a quantity of intoxicating liquor, containing one half of one per cent or more of alcohol by volume, said liquor being a quantity of wine and liquor—one half pint of latter—and about one fourth of a bottle of wine, being about one-fourth of a quart, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Deponent further says that he has reason to believe and does believe that H. P. Brown, P. Dubois, A. Carter are material witnesses to the subject matter of the complaint.

(Deponent's signature) H. P. BROWN.

Sworn to before me, and subscribed in my presence, this 20th day of March, A. D. 1922.

[Seal]

P. B. ELLIS,

United States Commissioner as Aforesaid. [4]

Filed Mar. 28, 1922. E. O. Patterson, Clerk
U. S. Dist. Court, Dist. Nevada. By O. E. Benham,
Deputy Clerk.

Warrant to Apprehend.

The President of the United States of America, to the Marshal of the United States for the District of Nevada, and to His Deputies, or Any or Either of Them:

WHEREAS, H. P. Brown has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the District of

Nevada, ——— Division, charging that William Borda and J. Bilbas, late of Douglas County, in the State of Nevada, did, on or about the 19th day of March, A. D. 1922, at Gardnerville, in said District, in violation of N. P. A. Act of the Revised Statutes of the United States, unlawfully knowingly and wilfully have in their possession a quantity of intoxicating liquor, containing one half of one per cent or more of alcohol by volume, said liquor being a quantity of wine and liquor—one half pint of *of* latter, and about one-fourth of a bottle of wine, being about one-fourth of a bottle of wine, being about one-fourth of a quart, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States of America, to apprehend the said William Borda and J. Bilbas, wherever found in your District, and bring their bodies forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 20th day of March, A. D. 1922.

[Seal]

P. B. ELLIS,

United States Commissioner as Aforesaid.

Approved:

United States Attorney, ——— District of ———.

[Endorsed]: The United States of America vs. Wm. Borda and J. Bilbas. Warrant to Apprehend. Issued 20th day of Mch., 1922. Returned and filed 20 day of Mch., 1922. P. B. Ellis, U. S. Commissioner.

Criminal Docket No. 3365.

RETURN.

Received this Warrant on the 20th day of March, 1922, at Carson City, and executed the same by arresting the within named defendants at Carson City on the 20th day of March, 1922, and have their bodies now in court, as within I am commanded.

THOMAS PICKETT,

U. S. Marshal, District of Nevada,

Per J. P. Fordin,

Deputy.

20th day of March, 1922. [5]

Filed Mar. 28, 1922. E. O. Patterson, Clerk U. S. Dist. Court, Dist. Nevada. By O. E. Benham, Deputy Clerk.

Search Warrant issued by Comm'r Warren—Complaint—Warrant and Bond.

Preliminary hearing and plea waived by Defendants through their Att'y G. L. Frick or Gardnerville. [6]

[Endorsed]: The United States of America vs. William Borda, J. Bilbas. Transcript of Proceedings before P. B. Ellis, United States Commissioner for the — Dist. of Nevada, — Division. Certificate. The United States of America, — District of —, —ss. — Division. I, the under-

signed, a United States Commissioner for said District, do hereby certify that the within is a full and true transcript of the proceedings had by and before me in the above named cause, and of the costs therein, as recorded in my docket —, page 31; and that the papers numbered one to —, inclusive, accompanying this transcript, are the original papers in said cause; all of which are herewith transmitted into the — Court of the United States, within and for said District. Witness my hand and seal on this 21st day of March, 1922. P. B. Ellis, U. S. Commissioner as aforesaid.

Criminal Docket No. 3365.

Filed Mar. 28, 1922. E. O. Patterson, Clerk U. S. Dist. Court, Dist. Nevada. By O. E. Benham, Deputy Clerk.

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WM. BORDA,

Defendants.

Information for Violation of the National Prohibition Act.

At the May Term of said Court in the year of our Lord, one thousand nine hundred and twenty-two, be it remembered that George Springmeyer, Esq., United States Attorney for the District of Nevada, who for the United States and in its behalf prose-

cuted in his own proper person, comes into court on the 26th day of June, 1922, and with leave of said Court first had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, were made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:

FIRST COUNT.

That J. BILBOA and WM. BORDA, hereinafter called the defendants, heretofore, to wit, on or about the 20th day of March, A. D. 1922, at Gardnerville, Douglas County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment [7] to the Constitution of the United States of America went into effect and before the filing of this Information in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That J. BILBOA and WM. BORDA, hereinafter called the defendants, heretofore, to wit, on or about the 20th day of March, A. D. 1922 at Gardnerville, Douglas County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the filing of this Information, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly sell intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [8]

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That J. BILBOA and WM. BORDA, hereinafter called the defendants, heretofore, to wit, on or about the 20th day of March, A. D. 1922, at Gardnerville, Douglas County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the filing of this Information, in violation of Section 21, Title II of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly maintain a common nuisance, in that

the said defendants did keep in that certain building situate at Gardnerville, Douglas County, State and District of Nevada, known as and called the "French Hotel," intoxicating liquor for sale; said liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,

United States Attorney. [9]

United States of America,
District of Nevada,—ss.

H. P. Brown, being first duly sworn, deposes and says:

That he is now and at all times hereinafter mentioned was Federal Prohibition Agent for the District of Nevada.

That on or about March 20th, 1922 at Gardnerville, Douglas County, State and District of Nevada, the said defendants, J. Bilboa and Wm. Borda, had in their possession intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; that said defendants did then and there sell intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; and that said defendants did then and there in that certain building called "The French Hotel," keep for sale intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

H. P. BROWN.

Subscribed and sworn to before me this 24th day of June, A. D. 1922.

[Seal]

ANNA M. WARREN,
Notary Public.

[Endorsed]: No. 5610. In the District Court of the United States for the District of Nevada, United States of America, Plaintiff, vs. J. Bilboa and Wm. Borda, Defendants. Information. Filed June 26, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [10]

Bench-Warrant.

United States of America,
District of Nevada.

To the Marshal of the United States for the District of Nevada, and to His Deputies, and Any or Either of Them—GREETING:

WHEREAS, at a District Court of the United States of America, begun and held at Carson City, Nevada, within and for the District aforesaid, on the 1st day of May, 1922, the District Attorney in and for said District brought into said court an Information against J. Bilboa and Wm. Borda, charging them with the crime of having on or about March 20th, 1922, at Gardnerville, in the county of Douglas, District of Nevada, violated the National Prohibition Act, as by said Information now remaining on file and of record in said court more fully appears, to which Information the said J. Bilboa and Wm. Borda hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said J. Bilboa and Wm. Borda and bring them before said Court in Carson City, Nevada, to answer unto said Information forthwith, or, if they require it that you take them before the Judge of said Court, or any United States Commissioner in said District, that they may give bail in the sum of \$1500.00 each to answer to said Information.

WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal thereof hereunto affixed, at Carson City, Nevada, this 26th day of June, 1922.

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy.

GEORGE SPRINGMEYER,

U. S. Attorney. [11]

Information for Violation of National Prohibition
Act.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Minutes of Court—August 14, 1922—Trial.

This cause coming on regularly for trial this day,

Mr. George Springmeyer, United States Attorney, appeared for and on behalf of the plaintiff; Mr. E. T. Patrick, for the defendants, the defendants being personally present. Thereupon the said defendants were duly arraigned upon the information as required by law. They each declared their true names to be as stated in the information and each entered a plea of not guilty. Mr. Patrick moved the Court for an order allowing separate trials to each of these defendants which motion was opposed by the United States Attorney;

IT IS ORDERED that the motion for separate trials in this case be, and the same is hereby, denied. The following named jurors were accepted by the parties and sworn to try the issue, viz.: Alphons Glock, Henry R. Burlington, Thos. J. Heidenreich, F. H. Summers, Charles J. Davenport, John J. Quinn, Paul S. Thompson, J. W. Black, Ralph D. Bath, E. D. Blake, Frederic J. Pierson and Geo. W. Wilson. At 4:15 the jury was admonished by the Court not to talk among themselves about the case nor to allow others to discuss it in their presence or talk to them about it and to refrain from making up their minds as to what their verdict would be until the case was finally submitted to them, etc., and were excused until to-morrow at ten o'clock.

Information for Violation National Prohibition
Act.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

**Minutes of Court—August 15, 1922—Trial (Con-
tinued).**

The further trial of this case was resumed at this time, the jury, counsel and the defendants being present. The Court instructs the jurors that if any of them have any conscientious scruples or if they now think they will be unable to follow the instructions of the Court they should make the fact known now. No replies forthcoming. Upon motion of Mr. Patrick plaintiff's witnesses who were at this time in attendance upon the Court were marshalled and sworn as follows, viz.: A. Carter, H. P. Brown and P. E. DuBois, and they were instructed as to the rule by the Court. Mr. A. Carter, P. E. Dubois and H. P. Brown were each called in turn and testified on behalf of plaintiff; also Mr. S. C. Dinsmore was duly sworn upon his arrival and testified for plaintiff. During this testimony plaintiff offered and had admitted and ordered marked, one wine glass and one whisky glass as Plff.'s Ex. No. 1 and 2; one white quart bottle containing one inch of wine as Plff.'s Ex. No. 3; one half pint flask containing dregs of liquor as Plff.'s Ex. No. 4; and one broken wine glass as Plff.'s Ex. No. 5. Plain-

tiff rests. Mr. S. C. Dinsmore called by defendant and Messrs. J. Bilboa, E. Aranda sworn as Spanish Interpreter, Wm. Borda, Fred Urdaburn sworn as French Interpreter, and E. O. Patterson all duly sworn and testified [12] for the defendants. Defendants rest. Upon motion of Mr. Patrick, and after argument by counsel for the respective parties,

IT IS ORDERED that Plff.'s Ex. No. 4 be excluded as against Wm. Borda and withdrawn from the consideration of the jury as against him. No further testimony being adduced, and after argument by counsel for the respective parties the case was submitted. Thereupon, and after hearing the instructions given by the Court, the jury retired in charge of the Marshal to deliberate on the case, and at 7:35 P. M. came into the Court with the following verdict, viz.: "In the District Court of the United States for the District of Nevada. The United States vs. J. Bilboa and Wm. Borda. No. 5610. We the Jury in the above-entitled case, find the defendant, J. Bilboa, guilty as charged in the first count of the information; guilty as charged in the second count; and not guilty as charged in the third count. Dated this 15th day of August, 1922. Geo. W. Wilson, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. J. Bilboa and Wm. Borda. No. 5610. We, the Jury in the above-entitled case, find the defendant, Wm. Borda, not guilty as charged in the first count of the information; guilty as charged in the second count; and

not guilty as charged in the third count. Dated this 15th day of August, 1922. Geo. W. Wilson, Foreman," and so they all say.

ORDERED, that these defendants appear in this court to-morrow at 1:30 P. M. for sentence. [13]

In the District Court of the United States for the
District of Nevada.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Verdict—Wm. Borda.

We, the Jury in the above-entitled case, find the defendant, Wm. Borda, not guilty as charged in the first count of the Information; guilty as charged in the second count; and not guilty as charged in the third count.

Dated this 15th day of August, 1922.

GEO. W. WILSON,

Foreman.

[Endorsed]: No. 5610. U. S. District Court, District of Nevada. The United States vs. J. Bilboa and Wm. Borda, Verdict. Filed this 15th day of August, 1922. E. O. Patterson, Clerk.

In the District Court of the United States for the
District of Nevada.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Verdict—J. Bilboa.

We, the Jury in the above-entitled case, find the defendant, J. Bilboa, guilty as charged in the first count of the Information; guilty as charged in the second count; and not guilty as charged in the third count.

Dated this 15th day of August, 1922.

GEO. W. WILSON,
Foreman.

[Endorsed]: No. 5610. U. S. District Court, District of Nevada. The United States vs. J. Bilboa and Wm. Borda, Verdict. Filed this 15th day of August, 1922. E. O. Patterson, Clerk. [14]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

May Term, 1922.

Violation National Prohibition Act.

No. 5610.

UNITED STATES OF AMERICA

vs.

J. BILBOA and WM. BORDA.

Judgment—J. Bilboa.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

An Information has been filed against you, J. Bilboa, for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; for unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by the keeping of intoxicating liquor for sale in that certain building situated at Gardnerville, Douglas County, Nevada, known as and called the "French Hotel"; said crimes having been committed on the 20th day of March, 1922, at Gardnerville, Douglas County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that Information, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the first and second counts of the Information. The defendant was then asked if he had any legal cause to show why the judgment of the court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be im-

prisoned in the county jail of Washoe County, Nevada, for the period of Four (4) Months from and after this date and pay to the United States a fine of Two Hundred Fifty (\$250.00) Dollars, and that you stand committed in said county jail until the fine is paid.

Dated and entered August 16, 1922.

Attest: E. O. PATTERSON,

By O. E. Benham,

Deputy. [15]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

May Term 1922.

Violation National Prohibition Act.

No. 5610.

UNITED STATES OF AMERICA

vs.

J. BILBOA and WM. BORDA.

Judgment—Wm. Borda.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

An Information has been filed against you, Wm. Borda, for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

for unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by the keeping of intoxicating liquor for sale in that certain building situated at Gardnerville, Douglas County, Nevada, known as and called the "French Hotel"; said crimes having been committed on the 20th day of March, 1922, at Gardnerville, Douglas County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that Information, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the second count of the Information. The defendant was then asked if he had any legal cause to show why the judgment of the court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Four (4) Months from and after this date.

Dated and entered August 16, 1922.

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy. [16]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

**Motion for Vacation of Judgment and for New
Trial.**

Come now the defendants above-named and jointly and severally move the Court that the judgment and sentence pronounced against each of them be vacated as to each of said defendants, jointly and severally, and that the Court grant a new trial to said defendants and each of them for the following reasons, and on the following grounds, to wit:

I.

That the Court erred in its decisions upon questions of law arising during the course of the trial.

II.

That the Court misdirected the jury in matters of law and fact.

III.

That the verdict of the jury is contrary to the law.

IV.

That the verdict of the jury is contrary to the evidence.

V.

That said verdict as to each and all of said defendants is not supported by the evidence.

Dated this 21st day of August, 1922.

E. T. PATRICK,
Attorneys for Defendants.
HUSKEY & KUKLINSKI,
Of Counsel.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Motion for a Vacation of Judgment and Motion for a New Trial. Filed Aug. 22, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. [17]

Indictment for Violation of National Prohibition Act.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Minutes of Court—August 22, 1922—Motion for Vacation of Judgment.

Mr. O. G. Kuklinski appeared this day and moved the Court for an order vacating the judgment as against both of these defendants, filed his petition for a writ of error and asked that bond be fixed for the release of said defendants pending the hearing of his motion. Mr. Kuklinski was allowed to withdraw, until Monday next, his petition for writ of

error. Matter taken under advisement by the Court.

Information for Violation National Prohibition
Act.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Minutes of Court—August 28, 1922—Order Denying Motion for New Trial.

These defendants appeared this day with their attorney, Mr. O. G. Kuklinski, who filed his motion for a new trial, which was submitted without argument.

IT IS ORDERED that the motion for a new trial in this case be, and the same is hereby, denied. Thereupon Mr. Kuklinski filed his petition for a writ of error, assignment of errors and writ of error. Mr. Kuklinski asked and was granted the benefit of an exception to the Court's ruling denying a new trial.

(Here follows order allowing writ of error as embodied elsewhere in this record.) [18]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Petition for Writ of Error.

To the Honorable W. S. FARRINGTON, Judge of
the District Court of the United States, for the
District of Nevada.

Now, come J. Bilboa and William Borda, the defendants in the above-entitled cause, and feeling themselves aggrieved by the verdict of the jury and the judgment of the District Court of the United States for the District of Nevada, made and entered on the 16th day of August, A. D. 1922, hereby petition, jointly and severally, for an order allowing them, said defendants, to prosecute a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from the District Court of the United States for the District of Nevada, and also pray the Court that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be prepared and sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said writ of error may be made a supersedeas and that your petitioners be released on bail in an amount to be fixed by the

Judge of said District Court pending the final disposition of said writ of error.

The assignment of error is presented herewith.
Dated this 28th day of August, 1922.

E. T. PATRICK,
Attorney for Defendants.
HUSKEY & KUKLINSKI,
Of Counsel.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Petition for Writ of Error. Filed Aug. 28, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. [19]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Order Allowing Writ of Error.

On this 28th day of August, A. D. 1922, came the defendants, J. Bilboa and William Borda, by their attorneys, Messrs. Huskey & Kuklinski, and filed herein and presented to the Court their petition praying for the allowance of a writ of error and

assignment of error intended to be used by them, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendants, J. Bilboa and William Borda, each giving a bond according to law in the sum of Four Thousand Dollars (\$4,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendants shall be and they are hereby ordered to be released from custody.

Done in open court this 28th day of August, A. D. 1922.

E. S. FARRINGTON,

District Judge.

I sign this order but in so doing I am obliged to say that the assignments of error have not been drawn altogether in accordance with rule 11 of the Circuit Court of Appeals.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Order Allowing Writ of Error. Filed Aug. 28, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada.

(Above order entered Aug. 28th, 1922, in Law Journal.) [20]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Bond on Writ of Error.

WHEREAS the defendants, J. Bilboa and William Borda, in the above-entitled action, have sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against them in said above-entitled cause in said United States District Court for the District of Nevada on the 16th day of August, A. D. 1922, or thereabouts; and

WHEREAS, the defendants by an order of Court heretofore duly made and entered are required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents

of the County of Douglas, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said J. Bilboa and William Borda that the said persons will pay all damages and costs which may be awarded against them on account of said writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 29th day of August, A. D. 1922.

PETER IRIBARNE.

C. F. W. DANGBERG. [21]

State of Nevada,

County of Washoe,—ss.

Peter Iribarne and C. F. W. Dangberg, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertakig; that he is worth the sum of Five Hundred Dollars (\$500) over and above all indebtedness and in property subject to execution.

PETER IRIBARNE.

C. F. W. DANGBERG.

Subscribed and sworn to before me this 29th day of August, A. D 1922.

[Seal]

ANNA M. WARREN,

U. S. Commissioner.

My commission expires ———, 192—.

Approved as to form and sureties August 30,
1922.

GEORGE SPRINGMEYER,
U. S. Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. *Bail Bond on Writ of Error.* Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. Filed Aug. 31 1922. E. O. Patterson, Clerk By O. E. Benham, Deputy. [22]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, William Borda, of the County of Douglas, State of Nevada, as principal, and Peter Iribarne and C. F. W. Dangberg of the County of Douglas, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Four Thousand Dollars (\$4,000.00), to which payment well and truly be

made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of August in the year of our Lord, one thousand nine hundred and twenty-two.

WHEREAS, lately on the 16th day of August, A. D. 1922, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and J. Bilboa and William Borda, defendants, a judgment and sentence was rendered against said defendants as follows, to wit:

That said J. Bilboa be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada, and in addition be fined in the sum of Two Hundred Fifty Dollars (\$250.00).

That said William Borda be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada. [23]

WHEREAS, the said defendant, William Borda, obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such,

that if the said J. Bilboa and William Borda shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

WILLIAM BORDA, (Seal)
Principal.

PETER IRIBARNE, (Seal)
Surety.

C. F. W. DANGBERG, (Seal)
Surety. [24]

State of Nevada,
County of Washoe,—ss.

Peter Iribarne and C. F. W. Dangberg, sureties

on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Douglas, State of Nevada; and that he is worth the sum of Four Thousand Dollars (\$4,000.00), over and above all his just debts and liabilities, in property not exempt from execution.

PETER IRIBARNE.

C. F. W. DANGBERG.

Subscribed and sworn to before me this 29th day of August, 1922.

[Seal]

ANNA M. WARREN,

United States Commissioner for the District of Nevada.

Approved as to form and sureties August 30, 1922.

GEORGE SPRINGMEYER,

U. S. Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendant. Bail Bond on Writ of Error. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. Filed Aug. 31, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.
[25]

In the District Court of the United States in and
for the District of Nevada

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, J. Bilboa, of the County of Douglas, State of Nevada as principal, and Peter Iribarne and C. F. W. Dangberg, of the County of Douglas, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full sum of Four Thousand Dollars (\$4,000.00), to which payment well and truly be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of August, in the year of our Lord, one thousand nine hundred and twenty-two.

WHEREAS, lately on the 16th day of August, A. D. 1922, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and J. Bilboa and William Borda, defendants, a judgment and sentence was rendered against said defendants as follows, to wit:

That said J. Bilboa be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada, and in addition be fined in the sum of Two Hundred Fifty Dollars (\$250.00).

That said Willam Borda be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada.

WHEREAS, the said defendant, J. Bilboa, obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of [26] Nevada, to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said J. Bilboa and William Borda shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the

judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such days or days as may be appointed for a re-trial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. BILBOA, (Seal)

Principal.

PETER IRIBARNE, (Seal)

Surety.

C. F. W. DANGBERG, (Seal)

Surety. [27]

State of Nevada,
County of Washoe,—ss.

Peter Iribarne and C. F. W. Dangberg, sureties on the annexed and foregoing undertaking, having first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Douglas, State of Nevada; and that he is worth the sum of Four Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

PETER IRIBARNE.

C. F. W. DANGBERG.

Subscribed and sworn to before me this 29th day of August, 1922.

[Seal]

ANNA M. WARREN,
United States Commissioner for the District of
Nevada.

Approved as to form and sureties August 29,
1922.

GEORGE SPRINGMEYER,
U. S. Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Bail Bond on Writ of Error. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. Filed Aug. 31, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.
[28]

In the District Court of the United States, in and
for the Distrnct of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Assignment of Errors.

Come now the defendants above named and file the following assignment of errors upon which they will rely upon the prosecution of the writ of error in the above-entitled cause from the judg-

ment made and entered by this Honorable Court on the 16th day of August, 1922.

I.

That the United States District Court erred in denying defendant's motion for vacation of judgment.

That there is no evidence to support the verdict and that this error is manifest in the record; that there is no evidence to show guilty knowledge of the defendants as to the alleged liquor found on said premises, and that this error is manifest in the record.

III.

That the Court ignored the element of knowledge in its instructions and that this error is manifest in the record.

IV.

That the verdict of the jury is contrary to the evidence and that this error is patent and manifest in the record.

V.

That the verdict of the jury is contrary to the law and this error is patent and manifest in the record.

WHEREFORE plaintiffs in error pray that the judgment [29] aforesaid be reversed and the cause remanded for such other and further proceedings as may be proper in the premises.

Respectfully submitted,

E. T. PATRICK,

Attorney for Defendant.

HUSKEY & KUKLINSKI,

Of Counsel.

[Endorsed]: No. 5610. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendant. Assignment of Errors. Filed Aug. 28, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. [30]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Praeceptum for Transcript of Record.

To E. O. Patterson, Clerk U. S. District Court,
Carson City, Nev.

We hereby request that you prepare for us copies of the records in the case of the United States vs. J. Bilboa and William Borda, as follows:

1. Copies of proceedings before the United States Commissioner, Anna M. Warren, including

(a) Copy of all testimony taken before said Anna M. Warren.

(b) Copy of any other papers or proceedings not included in the above had or taken before the said Commissioner and particularly affidavit upon which information was based.

2. Copy of minutes of Clerk of court showing the Court's ruling upon all motions and objections and exceptions.

3. Copy of information.

4. Complete transcript of testimony and instructions and notes taken by stenographer in said cause, this to be made part of bill of exceptions.

5. Copy of verdict of jury.

6. Copy of judgment and sentence.

7. Copy of motion for new trial and vacation of judgment.

8. Copy of petition for writ of error.

9. Copy of order allowing writ of error.

10. Copy of assignment of errors.

11. Copy of citation.

12. Copy of supersedeas bond.

13. Copy of cost bond.

E. T. PATRICK,

HUSKEY & KUKLINSKI,

Attorneys for Defendants.

[Endorsed]: No. 5610. In the United States District Court, for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Praecipe. Filed Sept. 1, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada. [31]

**Letter Dated September 6, 1922—O. G. Kuklinski
to E. O. Patterson.**

H. Walter Huskey.

Otto G. Kuklinski.

**HUSKEY & KUKLINSKI,
Attorneys and Counselors,
Reno, Nevada.**

September,
Sixth,
1922.

Mr. E. O. Patterson,
Clerk, U. S. District Court,
Carson City, Nevada.
No. 5610—U. S. vs. Bilbao et.

Dear Mr. Patterson:

Answering your letter of September first, I will state that the Praeipie was made out by me, thinking that testimony had been taken before the Commissioner, but since it has not been transcribed you may omit that from the record.

No more than your "Transcript og Proceedings in Criminal Cases" will be necessary under my request as to proceedings had before the Commissioner. Since the affidavit made in the case is part of the information it will not be necessary to make another copy of it.

Miss Torreyson advises me that a deposit of Forty-five Dollars will cover cost of transcribing testimony and instructions, I am therefore enclosing check for same and ask you to have Miss Torreyson

complete same as soon as she can and then take the original and file it for me sending me the copy.

Thanking you for this favor and the many other courtesies received from you, with kindest regards I beg to remain

Very truly yours,
(Signed) O. G. KUKLINSKI. [32]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

**Stipulation Extending Time to and Including Oc-
tober 29, 1922, to File Bill of Exceptions.**

It is hereby stipulated by and between counsel for the respective parties herein that defendants may have to and including the 29th day of October in which to prepare and file their bill of exceptions in the District Court and to file their papers on appeal, in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of September, 1922.

O. G. KUKLINSKI,
HUSKEY & KUKLINSKI,
Attorneys for Defendants.
GEORGE SPRINGMEYER,
United States Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Stipulation. Filed Sept. 21, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. Huskey & Kuklinski, Attorneys for Defendants. [33]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Order Extending Time to and Including October 29, 1922, to File Bill of Exceptions.

Upon the stipulation of counsel for the parties herein and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that the defendants herein be and they hereby are granted to and including October 29th, 1922, within which to prepare and file their bill of exceptions and papers on appeal in the United States District Court of Appeals for the Ninth Circuit.

Dated this 20th day of September, 1922.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa

and William Borda, Defendants. Order Extending Time to File Bill of Exceptions and to File Papers in the United States Circuit Court of Appeals. Filed Sep. 21, 1922. E. O. Patterson, Clerk. By. O. E. Benham, Deputy. Huskey & Kuklinski, Attorneys for Defendants.

(Above order entered Sept. 20, 1922 in Law Journal.) [34]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Stipulation Extending Time to and Including November 9, 1922, to File Bill of Exceptions.

It is hereby stipulated by and between counsel for the respective parties herein that the defendants above named may have to and including the ninth (9th) day of November, 1922, in which to prepare and file their bill of exceptions in the above-entitled case and to file the record of this case in the Circuit Court of Appeals, San Francisco, California.

Dated this 24th day of October, 1922.

HUSKEY & KUKLINSKI,
Attorneys for Defendants.
GEORGE SPRINGMEYER,
United States Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Stipulation. Filed Oct. 25, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys for Defendants. [35]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

**Order Extending Time to and Including November
9, 1922, to File Bill of Exceptions.**

Upon stipulation of counsel for the respective parties herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that the defendants above named may have to and including the ninth (9th) day of November, 1922, in which to prepare and file their bill of exceptions and in which to file the record in this case in the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California.

Dated October 25th, 1922.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada.

United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Order Extending Time. Filed Oct. 25, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys for Defendants.

(Above order entered Oct. 25, 1922, in Law Journal.) [36]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Stipulation Extending Time to and Including November 29, 1922, to File Bill of Exceptions.

It is hereby stipulated by and between counsel for the respective parties herein that the defendants may have to and including the twenty-ninth (29th) day of November, 1922, in which to prepare and file their Bill of Exceptions and the record on Writ of Error in this case in the Circuit Court of Appeals at San Francisco, California.

Dated this 1st day of November, 1922.

HUSKEY & KUKLINSKI,
Attorneys for Defendants.
GEORGE SPRINGMEYER,
United States Attorney.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada.

United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Stipulation. Filed Nov. 3, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys for Defendants. [37]

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Order Extending Time to and Including November 20, 1922, to File Bill of Exceptions.

Upon stipulation of counsel for the respective parties herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that the defendants above named may have to and including the twentieth (20th) day of November, 1922, in which to prepare and file their bill of exceptions and in which to file the record in this case in the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California.

Dated November 3d, 1922.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa

and William Borda, Defendants. Order Extending Time. Filed Nov. 3, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys for Defendants.

(Above order entered Nov. 3d, 1922 in Law Journal.) [38]

Information for Violation National Prohibition Act.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

Minutes of Court—November 17, 1922—Order Exonerating Bonds upon Appeal and that New Ones be Filed in Lieu Thereof.

Upon motion of Mr. George Springmeyer, United States Attorney, and upon his showing that Mr. C. F. W. Dangberg, one of the bondsmen herein upon the bond upon appeal, desires to withdraw therefrom,

IT IS ORDERED that a new bond be filed herein, in lieu of the old bond upon appeal, to be approved by the United States Attorney and this Court, and the old bond be, and the same is hereby, exonerated and the bondsmen thereon are released and discharged from any liability to be hereafter incurred upon said first mentioned bond. [39]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Bail Bond on Writ of Error.

WHEREAS the defendants, J. Bilboa and William Borda, in the above-entitled action, have sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Nevada, from a judgment made and entered against them in said above-entitled cause in said United States District Court for the District of Nevada on the 16th day of August, A. D. 1922, or thereabouts; and

WHEREAS, the defendants by an order of Court heretofore duly made and entered are required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause,

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Douglas, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said J. Bilboa and William Borda

that the said persons will pay all damages and costs which may be awarded against them on account of said writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound. [40]

Witness our signature this 16th day of November,
A. D. 1922.

PETER IRIBARNE.
JOHN ELISONDOBERRY.

State of Nevada,
County of Washoe,—ss.

Peter Iribarne and John Elisondoberry, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Douglas as to Peter Iribarne, Ormsby County as to John Elisondoberry, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; that he is worth the sum of Five Hundred Dollars (\$500.00) over and above all indebtedness and in property subject to execution.

PETER IRIBARNE.
JOHN ELISONDOBERRY.

Subscribed and sworn to before me this 16th day
of November, 1922.

[Seal]

E. O. PATTERSON,
Clerk U. S. District Court.
By O. E. Benham,
Deputy.

Approved as to form and sureties November 19,
1922.

GEORGE SPRINGMEYER,
U. S. Attorney.

E. S. FARRINGTON,
U. S. Dist. Judge.

[Endorsed]: 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Bail Bond on Writ of Error. Filed Nov. 17th, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys, Reno, Nevada. [41]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, William Borda, of the County of Douglas,
State of Nevada, as principal, and Peter Iribarne
and John Elisondoberry, of the County of Douglas,
State of Nevada, as sureties, are held and firmly
bound unto the United States of America, in the
full and just sum of Four Thousand Dollars

(\$4,000.00), to which payment well and truly be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of November, in the year of our Lord, one thousand nine hundred and twenty-two.

WHEREAS, lately on the 16th day of August, A. D. 1922, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said Court between the United States of America, plaintiff, and J. Bilboa and William Borda, defendants, a judgment and sentence was rendered against said defendants as follows, to wit:

That said J. Bilboa be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada, and in addition be fined in the sum of Two Hundred Fifty Dollars (\$250.00). [42]

That said witness Borda be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada.

WHEREAS, the said defendant, William Borda, obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said J. Bilboa and William Borda shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by the said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. BILBOA, [Seal]

Principal.

PETER IRIBARNE, [Seal]

Surety.

JOHN ELISONDOBERRY [Seal]

Surety. [43]

State of Nevada,

County of Washoe,—ss.

Peter Iribarne and John Elisondoberry, sureties

on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Douglas, as to Peter Iribarne, and Ormsby County as to John Elisondoberry, State of Nevada; and that he is worth the sum of Four Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

PETER IRIBARNE.

JOHN ELISONDOBERRY.

Subscribed and sworn to before me this 16th day of November, 1922.

[Seal]

E. O. PATTERSON.

Clerk U. S. District Court.

By O. E. Benham,

Deputy.

Approved as to form and sureties November 19, 1922.

GEORGE SPRINGMEYER,

U. S. Attorney.

E. S. FARRINGTON,

U. S. Dist. Judge.

[Endorsed]: 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Bail Bond on Writ of Error. Filed Nov. 17th, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys, Reno, Nevada. [44]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. Bilboa, of the county of Douglas, State
of Nevada, as principal, and Peter Iribarne and
John Elisondoberry of the County of Douglas, State
of Nevada, as sureties, are held and firmly bound
unto the United States of America, in the full sum
of Four Thousand Dollars (\$4,000.00) to which pay-
ment well and truly be made we bind ourselves,
our heirs, executors and administrators, jointly and
severally by these presents.

Sealed with our seals and dated this 16th day
of November, in the year of our Lord, one thou-
sand nine hundred and twenty-two.

WHEREAS, lately on the 16th day of August,
A. D. 1922, at a term of the District Court of the
United States for the District of Nevada, in a
cause pending in said court between the United
States of America, plaintiff, and J. Bilboa and
William Borda, defendants, a judgment and sen-
tence was rendered against said defendants as fol-
lows, to wit:

That said J. Bilboa be imprisoned for not less than four months in the Washoe County Jail, at Reno, Nevada, and in addition be fined in the sum of Two Hundred Fifty Dollars (\$250). [45]

That said William Borda be imprisoned for not less than four months in the Washoe County jail, at Reno, Nevada.

WHEREAS, the said defendant, J. Bilboa, obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court thirty days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said J. Bilboa and William Borda shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed,

and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

WILLIAM BORDA, (Seal)

Principal.

PETER IRIBARNE, (Seal)

Surety.

JOHN ELISONDOBERRY, (Seal)

Surety. [46]

State of Nevada,
County of Washoe,—ss.

Peter Iribarne and John Elisondoberry, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Douglas, as to Peter Iribarne, within Ormsby County as to John Elisondoberry, State of Nevada; and that he is worth the sum of Four Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

PETER IRIBARNE.

JOHN ELISONDOBERRY.

Subscribed and sworn to before me, this 16th day of November, 1922.

[Seal]

E. O. PATTERSON,
Clerk U. S. District Court.
By O. E. Benham,
Deputy.

Approved as to form and sureties November 19, 1922.

GEORGE SPRINGMEYER,
United States Attorney.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: 5610. In the United States District Court, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Bail Bond on Writ of Error. Filed Nov. 17th, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys, Reno, Nevada. [47]

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,
Defendants.

Order Extending Time to and Including December 4, 1922, to File Record and Docket Cause.

Good and sufficient cause appearing therefor and

on stipulation counsel for the respective parties herein,

IT IS ORDERED that the defendants herein be and they hereby are granted to and including the 4th day of December, 1922, within which to file the papers and record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of November, 1922.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and Wm. Borda, Defendants. Order Extending Time. Filed Nov. 20, 1922. E. O. Patterson, Clerk. Huskey and Kuklinski, Attorneys at Law, Reno, Nevada.

(Above order entered Nov. 20, 1922, in Law Journal.) [48]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Bill of Exceptions on Behalf of Defendants.

BE IT REMEMBERED: That in the term of

April 1922, No. 5610, came the United States of America into the said court and impleaded the said defendants in a certain information of violation of the National Prohibition Act, said information containing three charges, to wit, violation of Section 3, title II, by sale and possession of intoxicating liquor and violation of Section 21 of the same Act for maintaining a common nuisance and the said defendants pleaded not guilty. And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at Carson City, Nevada, before the Honorable E. S. Farrington, Judge of said Court on the 14th day of August, 1922, the aforesaid issues between the said parties came to be tried by a jury of said District of Nevada, for that purpose duly impaneled, at which day came as well the said complainant as the said defendants, by their respective attorneys, and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed, respectively to try the said issue, and upon the [49] trial, Mr. George Springmeyer, United States Attorney, appeared as attorney for the plaintiff and Mr. E. T. Patrick appeared as attorney for the defendants.

WHEREUPON the following proceedings were had and testimony introduced:

The information is read by the Clerk, and the defendants plead not guilty.

Mr. PATRICK.—Before we proceed with the trial, I wish to make a motion for separate trials.

In case number 5587, an indictment against Bilboa and Borda, a trial was had and William Borda was acquitted. That alleged possession, sale and a nuisance on February 26th, 1922. In this case, number 5610, an information charges an offense on or about March 20th, 1922, for possession, sale and nuisance. Your Honor will remember that in the first case Borda was acquitted; and you will also possibly remember in the trial of that case certain exhibits were put in by the Government, consisting, as I remember, of a half pint bottle of whiskey, and a small bottle of whiskey, which the witness Scott testified he had bought in the saloon, held in his mouth, and spit into the bottle; and they also introduced a bottle containing bitters, called Hufeland Bitters. I don't know whether it is the purpose of the District Attorney to introduce those same exhibits or not; but if he tells me it is his purpose to introduce the whiskey and the exhibits from the former case, and if they are introduced, they will be highly prejudicial to the defendant Borda, and tend to prove him guilty on a charge of which he has already been acquitted. I am informed, and believe it to be true, that only one raid was made by the prohibition officers on these premises, the French Hotel in Gardnerville, and at that time they seized a small half pint of whiskey, [50] which was introduced in evidence in the other case.

The COURT.—Is this the same offense that was charged in the other case?

Mr. PATRICK.—One offense was charged on

February 26th, and the other on March 20th. Your Honor will remember that the case opened with the testimony of Mr. Scott that he bought certain drinks in the French Hotel on February 26th; then to corroborate the testimony of Scott, the United States, as it has a perfect right to do, introduced the testimony of a similar offense which was committed on the 20th of March, in which they showed that the testimony of Scott must be true because on the 20th of March, on raiding the place, they found liquor similar to what he claimed to have purchased and used on that occasion.

It seems to me unfair that these men should be tried together, because some of the testimony to be introduced would not be admissible to Borda, he would not have the opportunity of his former acquittal; and for that reason I ask a separate trial for the defendants. I do not care in which order they are taken.

The COURT.—I think if that testimony appears I shall instruct the jury that they are not to consider that in relation to the charge against Mr. Borda, if it develops that it is the same case. The motion is denied.

Mr. PATRICK.—We desire to save an exception to your Honor's ruling.

The COURT.—You may have an exception.

(A jury is duly and regularly selected, impaneled and sworn to try the case, and is admonished by the Court, and at 4:10 P. M. an adjournment is taken until to-morrow, August 15th, 1922, at 10:00 o'clock A. M.) [51]

Tuesday, August 15th, 1922.

Court convened 10:00 o'clock A. M.

(All parties present. The Clerk calls the roll of jurors.)

The COURT.—(Addressing the jury.) Gentlemen, you have already been sworn to try this case, but if any of you have conscientious scruples against following the instructions of the Court as to the law in these cases, you must remember your oath and to what it binds you. If you have such conscientious scruples, and you didn't understand the matter before you took your oath, you ought to correct it, and indicate that fact just as soon as possible; and you have the opportunity to do it now if any of you feel that you cannot obey implicitly the instructions of the Court.

I will now permit the reading of the Information.

(The Clerk reads the Information. By request of counsel for the defendants, all witnesses for the plaintiff, with the exception of Professor S. C. Dinswore, are sworn, placed under the rule, and admonished by the Court.)

GOVERNMENT EVIDENCE.

Testimony of A. Carter, for the Government.

Mr. A. CARTER, called as a witness by plaintiff, having been previously sworn, testified as follows:

Direct Examination by Mr. SPRINGMEYER.

Q. Your name is A. Carter, is it not. A. Yes.

Q. You are now, and have been ever since the

(Testimony of A. Carter.)

first part of February of this year, a Federal Prohibition Agent for the State of Nevada, have you not? A. I have.

Q. You were such on or about the 20th of March of this year? A. Yes.

Q. Do you know the defendants, J. Bilboa, seated next to Mr. Patrick, and the man beside him, Mr. Borda? [52] A. Yes, sir.

Q. Do you know their place of business in Gardnerville, Douglas County, Nevada? A. Yes.

Q. What is the place of business called?

A. There are several places around there that we raided, I forget what particular place that is right now.

Q. Do you know whether it is the French Hotel.

A. Yes, the French Hotel.

Q. Where is that situated?

A. That is on the same side of the street as the North Fork Hotel, and all the rest of those.

Q. Is it on the Main Street?

A. On the Main Street in Gardnerville.

Q. At what time, day or night, were you on those premises? A. Somewhere around midnight.

Q. How did you enter the premises, and with whom?

A. I entered the premises with Mr. Brown and Mr. DuBois, through the front door.

Q. Did you look in before you entered?

A. Yes, I looked in the window.

Q. What, if anything, did you see?

(Testimony of A. Carter.)

A. I saw two men standing at the bar, about ready to take a drink.

Q. What sort of a drink, if you know?

A. We afterwards got the drink spilled out on the bar; one was wine and the other corn whiskey.

Mr. PATRICK.—I would like to have the answer read.

(The reporter reads the answer.)

Mr. PATRICK.—I ask that the answer be stricken out as a conclusion of the witness. [53]

The COURT.—Well, you may question him as to his qualifications to answer as to whether it was wine or not, if you wish. I suppose that is the point, that he is not qualified as an expert to tell whether it was wine or not.

Mr. SPRINGMEYER.—If you dispute that I will take up the time which I thought I would save.

Mr. PATRICK.—I dispute it, yes.

Mr. SPRINGMEYER.—(Q.) Do you know corn whiskey when you see it? A. Yes.

Q. Did you know it on the 20th of March?

A. Yes.

Q. Do you know it when you see it and smell it?

A. Yes.

Q. Did you know it on the 20th day of March this year? A. Yes.

Q. How long prior to that time had you known corn whiskey and wine?

A. Oh, I have known it for several years.

Q. Have you had any experience with those liquors? A. Yes, sir, on several occasions.

(Testimony of A. Carter.)

Q. Have you tasted them? A. Yes.

Q. Been present when analyses of them have been made? A. Yes.

Q. Can you say what sort of liquor was in these glasses? A. Red wine and corn whiskey.

Q. Did you see anybody back of the bar as you looked through the glass from the outside?

A. Yes, sir.

Mr. PATRICK.—The question is leading. I object to the form of the question.

Mr. SPRINGMEYER.—(Q.) Did you see any one back of the bar when you looked in from the outside? A. I did.

Mr. SPRINGMEYER.—Do you say that is leading, Mr. Patrick? [54]

The COURT.—I think I will allow that question; it is leading, of course, but it takes a great deal of time to ask him who he saw in there, and where they were. I shall refuse to sustain the objection, and counsel may have an exception.

Mr. PATRICK.—That is what I was going to ask for.

Mr. SPRINGMEYER.—(Q.) Let me ask you, what did you see, and who, and where as you looked through the glass from the street?

A. I saw the gentleman farthest over there (indicating).

Q. That is Mr. Borda? A. Yes, sir.

Q. Where did you see him?

A. Behind the bar, directly in front of these two men who were standing at the north side of the

(Testimony of A. Carter.)

bar. There was a piece of money on the bar, I can't tell what denomination; and these two glasses of liquor; they were about to take a drink. As we entered the door this man had just turned around with the money, I presume to ring it up in the cash register, I don't know what he did with it. Mr. Brown and myself made a quick trip, grabbed these glasses; we spilled the liquor all over the bar, and got the glasses; that is all.

Q. What sort of glasses were they, Mr. Carter?

A. One was a little wine glass, an ordinary wine glass, and the other was a whiskey glass, known as a whiskey glass.

Q. Would you recognize those glasses if you saw them? A. Yes.

Q. What, if anything, did you do with the glasses? A. We kept them as evidence.

Q. Will you please examine these glasses which I hand you, and state whether these glasses, or any one or two of them, are the glasses you refer to? [55]

A. I would say they were two glasses like those two there.

Q. Do you know whether this glass (indicating) was found there at that time or not?

A. I could not say; I know there was a glass like that, about that size.

Q. What did you do with those glasses?

A. We took those as evidence.

Mr. PATRICK.—I didn't understand the answer.

A. We took those as evidence.

(Testimony of A. Carter.)

Mr. SPRINGMEYER.—Will you please speak a little louder. I offer those two glasses in evidence, and ask that they be marked as Plaintiff's Exhibits 1 and 2. Any objection?

Mr. PATRICK.—Yes, we object. They have not been properly identified in any way, shape or form; he said they were similar glasses, but he does not say they are the same glasses. Object to the introduction of the glasses for that reason, want of identification.

Mr. SPRINGMEYER.—(Q.) What did you say you did with the glasses, Mr. Carter?

A. I said we retained them as evidence.

Q. Where did you take them?

A. Well, we put all the stuff on top of the bar there, and sealed the evidence, and put it in the machine; it was taken to Reno and put in the police station; we have a locker there; and afterwards we turned it over to Mr. Dinsmore.

Q. Inasmuch as there was no marking on the glasses, all you can say is that they were glasses similar to these?

A. Yes, sir, that might have been the glass there for all I know.

Mr. SPRINGMEYER.—I think under the circumstances that is sufficient, may it please the Court. [56]

Mr. PATRICK.—I think it is insufficient, may it please the Court.

By the COURT.—(Q.) When you put those glasses in the car into whose possession did they go?

(Testimony of A. Carter.)

A. Mr. DuBois, I think, took possession of them.

Q. We took the glasses from the bar?

A. Well, we left the bottles and glasses sitting on the bar.

Q. Some one took them off the bar and put them in the car, who did that? A. I don't know.

Q. You didn't? A. No.

Q. Did you ever see the glasses again?

A. No, sir.

Q. Before they came into court? A. No.

The COURT.—Well, they may be marked for identification, if you wish. (The bottles are marked Plaintiff's Exhibits 1 and 2 for identification.)

Mr. SPRINGMEYER.—(Q.) Did you find anything on the bar, or back of the bar, or near the bar? A. Yes.

Q. What?

A. I immediately took possession of the bar, as we had agreed to do, and the other boys went in the back room to search; and I found on the drain-board immediately behind the bar where these gentlemen had been standing, a wine bottle, brown bottle, about one quarter or a third full of wine, with the cork out, which I took possession of.

Q. Will you please examine this bottle, and state whether that is the bottle? (Hands to witness.)

A. No, I don't think that is the bottle.

Q. Will you excuse me a moment until I see Mr. Dinsmore, he has given me the wrong bottle. Mr. Carter, will you please examine [57] this carefully, examining the initials and the markings upon

(Testimony of A. Carter.)

it, and state whether or not you correct your answer.

A. I think there was more wine in the bottle when we got it; Mr. Dinsmore has taken some out for analysis; but the bottle that we got seemed to me like there was about that much wine (indicating).

Q. Whose initials are on the label?

A. Those are my initials.

Q. What does the label show as to what case it is?

A. That shows it is the case.

Q. What other initials are on there?

A. The boys that went in with me, Brown and DuBois; we all placed those on there.

Q. Was the label placed on there while all three were present? A. Yes.

Q. Will you say whether or not that is the bottle?

A. I will say that is the bottle.

Q. Will you say whether there was more or less liquor in there at that time?

A. There was about that much wine in it at that time (indicating on bottle).

Q. What was done with this bottle with reference to sealing it, or otherwise, at that time?

A. That is all that was done with it, was sealing it.

Q. Who sealed it, if you know?

A. Why, Mr. Nash used to carry a little sack of labels, and seals and so forth, and brought them in; they sealed it right on top of the bar, maybe, Mr.

(Testimony of A. Carter.)

DuBois did; Mr. DuBois took charge of the sample.

Q. Please state what was done, if anything, with reference to sealing this bottle on that occasion; was it sealed or not? [58]

A. It was placed on top of the bar, and Mr. DuBois and Mr. Nash took charge of it; that is all I know about it.

Q. Mr. Nash or Mr. Brown? A. Mr. DuBois.

Q. I thought you said, Mr. Carter, that Mr. Brown was with you on this raid?

A. He was; later on they came in.

Q. And who sealed the bottle, if you know?

A. I don't know.

Q. Was it sealed in your presence, or not?

A. No.

Mr. SPRINGMEYER.—I will ask that this be marked for identification.

(The bottle is marked Plaintiff's Exhibit No. 3 for identification.)

Q. Did you find any other liquor in those premises on that occasion? A. I did.

Q. What?

A. I found a small flask, about a half-pint flask, at the end of what is known as the back-bar; there were some rubbers there, and in this rubber was this pint flask; I noticed the neck of the bottle sticking out of the toe of this rubber, and I called Mr. Brown's attention to it as I took it out.

Mr. PATRICK.—Now, if the Court please, I desire the jury be instructed that any testimony in re-

(Testimony of A. Carter.)

gard to this bottle, so far as it relates to the defendant William Borda be excluded, for the reason that in case number 5587, which was an indictment, for a violation of the Volstead Act against these two defendants, Mr. Borda and Mr. Bilboa, this same bottle was introduced in evidence, and testified to as being found under the same circumstances by this witness; on that trial Mr. Borda was acquitted, and the same evidence cannot now be used against him in this case. [59]

The COURT.—You say that he was tried for having this bottle in his possession at that time?

Mr. PATRICK.—Yes, sir, he was.

The COURT.—Very well. Please produce the indictment in which he is charged with having this bottle in his possession at that time.

Mr. PATRICK.—That is case number 5587; it alleges the offense of possession.

The COURT.—I would rather see the indictment. (The indictment is produced.)

Mr. PATRICK.—I suggest that we proceed with the case, and that your Honor, after being fully advised in the premises, rule on my motion, and that can be done in the way of final instructions to the jury. I make that suggestion in order to save time and proceed with the case.

The COURT.—There is no objection made to the introduction of this bottle, if it is properly identified; but the bottle that was found in the rubber shoe you do object to?

(Testimony of A. Carter.)

Mr. PATRICK.—Yes, so far as Mr. Borda is concerned.

Mr. SPRINGMEYER.—(Q.) You stated, Mr. Carter, I believe, that you found a bottle in a rubber shoe? A. Yes.

Q. What sort of a bottle was it? A. A flask.

Q. Do you know what it contained?

A. It contained liquor.

Q. Could you identify that bottle if you saw it?

A. Yes.

Q. Please examine this bottle, and state whether that is the bottle or not. (Hands bottle to witness.)

A. Yes, sir, that is the identical bottle.

Q. About how much liquor was in it at the time?

A. About a third full, I would judge. [60]

Q. What was done with this bottle?

A. That bottle was sealed and turned over to Mr. Dinsmore.

Q. Was that sealed at the same time the bottle which is marked Exhibit No. 3 for identification was sealed?

A. I could not say; I didn't seal those bottles.

Q. You didn't seal this one either?

A. No, I placed them on top of the bar, and they were sealed by one of the other agents.

Mr. SPRINGMEYER.—I ask that this be marked for identification also.

(The bottle is marked Plaintiff's Exhibit No. 4 for identification.)

Q. Did you at any time during the course of that raid on that occasion see the defendant Mr. Bilboa?

(Testimony of A. Carter.)

A. Yes, sir.

Q. When and where did you see him?

A. I saw him after the raid had been made; we asked the bar-tender there—

Q. Is that Mr. Borda?

A. Yes, if he owned the place, and he did not, and we asked him who the owner was, and he said Mr. Bilboa there; and we asked him where he was, and he said he was up in the room asleep; Mr. Brown took Mr. Borda and I stayed in the bar-room with Mr. DuBois and a couple of other gentlemen in there; and we all stayed in there, and Mr. Brown went up and got this gentleman and brought him down, and he admitted he was the owner of the place.

Q. Did you hear him? A. Yes.

Q. What words did he use?

A. Mr. Brown says, "Are you the proprietor of this place?" and he says, "Yes, I am." "Well," he says, "you are under arrest then, I arrest the two of you"; and we asked him if they could get bail, [61] and this gentleman Bilboa went to the safe door to unlock the safe, and about that time, or previously, phoned to a man to come over and put up bail for him, and this gentleman came in.

Q. Were both of the defendants placed under arrest on that occasion? A. Yes.

Mr. SPRINGMEYER.—You may cross-examine.

Cross-examination.

Mr. PATRICK.—(Q.) When did this happen, Mr. Carter?

(Testimony of A. Carter.)

A. It happened somewhere around midnight, or thereafter.

Q. A year ago?

A. I don't think it was that long.

Q. Well, can you give me the day and the month, you haven't stated it yet that I know of.

A. It was in the morning, I believe, of the 20th.

Q. The 20th of what month? A. March.

Q. March 20th after midnight; you stated you looked through the door, was it a glass door; what sort of door was on that French Hotel?

A. It was a glass door.

Q. Plain glass? A. Well, I didn't—

Q. Or frosted?

A. I didn't notice the door particularly; I looked through the window.

Q. You what?

A. I looked through the window.

Q. Was there a window in the door? You looked through the window, you didn't look through the door? A. No, sir.

Q. What did you see?

A. I saw two men standing in front of the bar, and a gentleman standing behind the bar, and I saw two glasses on the bar, and a piece of money on the bar.

Q. Did you know these two men? [62]

A. And the men in the act of taking a drink?

Q. Did you know these two men? A. No, sir.

Q. Did you detain them as witnesses?

A. No, sir.

Q. Why not? A. I don't know.

(Testimony of A. Carter.)

Q. And you say there was a glass before each man, a small glass or a large glass? A. Yes, sir.

Q. Was there anything in them? A. Yes, sir.

Q. Had they drank from them? A. No, sir.

Q. The glasses were standing there on the bar filled? A. Yes, sir.

Q. And the parties had paid for the drink, and had not yet drank it?

A. I don't know whether they had paid for them or not; there was money there; I suppose they were paid for.

Q. Who entered with you?

A. Mr. Brown and Mr. DuBois.

Q. The three of you entered together; when you entered the glasses were standing on the bar filled?

A. Yes, sir.

Q. How did they become spilled?

A. Mr. Brown and myself made a grab for them.

Q. And who turned them over?

A. Well, they were turned over in the scuffle.

Q. Did Mr. Borda have anything to do with turning them over? A. No, sir.

Q. They were turned over through your impetuous grab for them, by you and Mr. Brown?

A. Yes, sir.

Q. What did you do to Mr. Borda after coming in there?

A. Mr. Borda got away around the end of the bar, and Mr. Brown grabbed him, and tore his shirt open.

Q. Did Mr. Borda try to destroy any evidence?

(Testimony of A. Carter.)

A. He didn't have any time. [63]

Mr. PATRICK.—I move that be stricken out.

The COURT.—That may go out.

Mr. PATRICK.—(Q.) Did Mr. Borda try to destroy any evidence? A. No, sir.

Q. Did he make any attempt to destroy any evidence? A. I didn't see any.

Q. How did you determine that this was red wine and corn whiskey?

A. By looking at it and smelling of it.

Q. How many times have you looked at red wine and corn whiskey? A. I don't know.

Q. You have been a man, I think you testified in the former case, that never was accustomed much to intoxicating liquors? A. Yes, sir.

Q. Didn't you testify to that before?

A. Yes, sir.

Q. How much experience have you had with intoxicating liquors? A. I don't know.

Q. How many times have you drank corn whiskey? A. I could not say.

Q. How many times have you smelled corn whiskey? A. I don't know that either.

Q. How many times have you drank red wine?

A. I could not say that either.

Q. How many times have you smelled red wine?

A. I don't know.

Q. As a matter of fact, you have been a person of good habits in regard to intoxicating liquor all your life, haven't you, Mr. Carter? A. Yes.

Q. And haven't had much experience with it even

(Testimony of A. Carter.)

before the Volstead Act went into effect, is that right?

A. Oh, I had quite a lot of experience with it in different ways. [64]

Q. You have what?

A. Yes, I have had some experience with it.

Q. But very little?

A. Well, I have seen quite a lot of it.

Q. I mean so far as you are personally concerned, you have not consumed much liquor of any kind?

A. No, sir.

Q. Even before the Volstead Act went into effect?

A. No, sir.

Q. That bottle that has been marked for identification, you stated positively it was not the bottle, I believe?

A. Well, I have been on so many raids at first I—

Q. Oh, you have been on a good many raids, have you, since the first of February, since you became a prohibition officer?

A. I would say I have.

Q. About how many?

A. Oh, probably a hundred or so.

Q. What caused you afterwards, Mr. Carter, to state that this was the bottle?

A. Well, we put our initials on there for identification, on these bottles, so when the time arrives we will know them.

Q. What are your initials? A. A. C.

Q. Where are they?

A. Right there. (Indicating on bottle.)

Q. Is that in your handwriting?

(Testimony of A. Carter.)

A. Yes, sir, right here. (Indicating.)

Q. Did you put a date on the bottle at the time?

A. No, sir, I put my initials.

Q. Any date on that bottle? A. Yes, sir.

Q. Where is the date?

A. Right there (indicating); it is marked March 19th, 1922.

Q. This was not on March 19th, was it?

A. This was around midnight, I say. [65]

Q. At the time you sealed this bottle it was March 20th, was it not, after midnight?

A. It was around midnight, that is all I know.

Mr. SPRINGMEYER.—He said it was the morning of the 20th, about midnight; I presume he didn't know whether it was before or after midnight.

Mr. PATRICK.—(Q.) Except for the date, Mr. Carter, you could not tell that bottle from hundreds of other bottles you have seized in other searches, could you?

A. The bottles are about the same.

Q. It was your custom anything you took as evidence to put your initials on? A. Yes, sir.

Q. This bottle was not sealed in your presence; you don't know who sealed it? A. No, sir.

Q. Now about this small flask, I wish you would tell the jury and explain to the jury where you found this flask; and you might illustrate by standing along here and showing where the bar was, considering the Judge's Bench the bar.

(Testimony of A. Carter.)

A. All right, sir. This here (indicating) would be the front bar; this is a back bar where they keep the bottles, and so forth, and right at the end of the back bar were overshoes.

Q. I think you will make it plainer if you come around here, Mr. Carter. A. All right.

Q. Because Mr. Borda was on the other side of the bar, wasn't he, when you went in?

A. Yes, sir.

Q. This was the front of the bar on this side; now where did you find this bottle?

A. This is the front of the front bar.

Q. Yes.

A. Mr. Borda was standing back of the bar.
[66]

Q. Back of the bar when you found the bottle?

A. No, I didn't say that.

Q. When you went in? A. Yes.

Q. Where was this bottle with reference to the front of the front bar?

A. Well, it was the back bar, behind the front bar.

Q. This is the front of the front bar, isn't it?

A. No.

Q. Come around here and get it straightened out. Stand up as though you were standing up in front of the bar.

A. (Standing as requested.) These customers were standing in front of the bar like this.

(Testimony of A. Carter.)

Q. And the back bar was over there where the clerk is? A. No.

Mr. SPRINGMEYER.—He says the customers were standing there.

A. I am standing in the position of the customers; and Mr. Borda was standing there (indicating), and the back bar is right along there.

Mr. PATRICK.—(Q.) You found this over about where the chair is?

A. This was at the end of the back bar; Mr. Borda would be about in this position, where he was standing, and the back bar runs along here, with the glasses, doors, and so forth, in where they have the bottles at the end here, where they come in and take off their rubbers and put them there; and there were several pair there, two or three pair I should say, and I noticed that bottle sticking in one of these rubbers.

Q. This was tucked into one of the rubbers so you could see it?

A. Yes, sir, there was the neck of the bottle sticking out pretty well. [67]

Q. At the time you entered there, were there more persons than these two customers?

A. Yes, sir, there was another man sitting down at the stove, and he was sitting about four or five feet away; there is a stove at the end of the bar.

Q. Did you make any inquiry of those people as to who owned those rubbers? A. No, sir.

Q. Was there a pair of rubbers there together?

(Testimony of A. Carter.)

A. Yes, sir.

Q. And more than one pair? A. Yes.

Q. Did you ask Mr. Borda if those were his rubbers, or Mr. Bilboa? A. No, sir.

Q. You made no inquiry at all about them?

A. No, sir.

Q. You had nothing to do with the sealing of this bottle either? A. No, sir.

Mr. PATRICK.—That is all.

(A short recess is taken at this time.)

Testimony of P. E. DuBois, for Plaintiff.

Mr. P. E. DUBOIS, called as a witness by plaintiff, having been previously sworn, testified as follows:

Direct Examination by Mr. SPRINGMEYER.

Q. Your name is P. E. DuBois? A. Yes, sir.

Q. And you are and have been during all of this year a Federal Prohibition Agent for the State of Nevada, have you not? A. I have.

Q. Were you present late during the night of March 19th, about twelve o'clock, or just before twelve and just after twelve o'clock, when Mr. Carter and Mr. Brown entered the French Hotel at Gardnerville, Nevada? A. I was.

Q. Before entering the hotel what was done by the three of you, or any one of you from the outside, if you know? [68]

A. Well, Mr. Carter, I believe it was, looked through the window before we went in; I guess

(Testimony of P. E. DuBois.)

probably both of them did; I didn't until we entered; I followed right in with them, but I didn't peek through before we entered, I followed right in with them.

Q. What did you do when you entered?

A. I ran right straight back along the bar, and there was a young fellow started to run to where there was an opening, a door opening, he turned to the left, and as he turned to the left I grabbed him, and he came back into the bar-room.

Q. Was that either one of these defendants?

A. Oh, no.

Q. It wasn't either one of these defendants?

A. It was a fellow called Doc, a young doctor, I guess.

Q. Did you see anything or anyone any place in the premises?

A. There was a couple of men standing at the bar, and there was two glasses on the bar; I just saw them as they ran in before I had got these parties, and I didn't stop at the bar at all going through.

Q. Did you see anything when you came back with this man you call Doc, on the bar?

A. I saw the glasses that the boys had.

Q. Did you see anything else?

Q. And a bottle; a bottle of wine, or a bottle of something; a bottle that had something in; that was a quart bottle and the boys had it then.

Q. Anything else?

(Testimony of P. E. DuBois.)

A. Some glasses, three glasses.

Q. Did you see any other bottles outside of the quart bottle?

A. Outside of the quart bottle?

Q. Other than the quart bottle? [69]

A. Not at that time, no.

Q. Did you later on? A. Yes, I did.

Q. Where did you see it?

A. I saw Mr. Carter have it in his hands; Mr. Carter turned and I heard him holler, and I looked around, and he had the bottle in his hand; he said he got it out of the overshoe; I didn't see him take it out of the overshoe, but he turned around from where there was a couple of pair of overshoes sitting in the corner.

Q. Do you know what was done with the glasses?

A. The glasses were taken as evidence.

Q. Who took them?

A. I think it was Mr. Carter or Mr. Brown that labeled them; I helped label them; I took charge of the evidence and labeled it after Mr. Nash had written the labels, and Mr. Brown and I sealed the bottles.

Q. Could you identify the glasses if you saw them? A. I think so.

Q. Would you please examine exhibits one and two for identification, and the broken glass I hand you, and state whether or not they are the glasses?

A. That looks like the broken glass.

(Testimony of P. E. DuBois.)

Q. For your information these marks were put on by the Clerk.

A. Well, there was a whiskey glass, that looks like the glass; there was also two wine glasses, one of them was broken.

Q. Well, were there glasses of that sort?

A. Yes.

Q. Do you know whether or not those are the glasses?

A. Yes, I would say that they are the glasses; they are identically the same, and there was a piece broken out of one of them.

Q. Were they kept with the other evidence?

A. Yes. [70]

Q. Who did you say had the other evidence?

A. I had it; I took the other evidence home with me.

Mr. SPRINGMEYER.—I ask this be marked for identification.

(The glass is marked Plaintiff's Exhibit No. 5 for identification.)

Mr. SPRINGMEYER.—That is the broken glass.

WITNESS.—And on the morning of the 21st I turned it over to Professor Dinsmore at the city jail in Reno.

Q. Were these out of your possession at any time? A. No.

Q. From the time you took them after they were sealed by you, as you state, to the time you delivered them to Professor Dinsmore?

(Testimony of P. E. DuBois.)

A. They were not.

Q. Who wrote out the labels on the bottles?

A. Mr. Nash wrote them out.

Q. Do you know whether or not the labels were initialed?

A. I am pretty positive; I usually initial the labels before I leave a place.

Q. Could you recognize your labeling?

A. Yes, sir.

Q. Would you please examine exhibit number 3 for identification and state whether that is one of the bottles?

A. It is; my initials are on there.

Q. And exhibit number 4 for identification?

A. Yes, sir.

Q. Are those the two bottles you sealed?

A. Yes, sir.

Q. Were the defendants or either of them present at the time?

A. I think both of them were present at that time.

Q. Did you hear any conversation between the defendants and Mr. Carter or Mr. Brown?

A. Well, I can't recall the conversation that took place after we got the evidence; I wasn't right at the bar and not right with them; I was near the stove talking to this doctor that I had had the chase with back through the room. [71]

Q. Which one of the defendants was there at the

(Testimony of P. E. DuBois.)

time you entered the room; you said one of them was there?

A. Well, I don't know; I don't know whether I could identify which one; I remember they were both in there afterwards; one was called down; the proprietor was called out of bed and brought downstairs; I rather think it is the larger of the two.

Q. Who was called down from upstairs?

A. No, that was in there.

Mr. SPRINGMEYER.—You may cross-examine.

Cross-examination.

Mr. PATRICK.—(Q.) Were these parties placed under arrest that night. A. Yes, sir.

Q. Did they give bond?

A. Well, I believe they did; I believe the sheriff came in there and there was a bond fixed for their appearance.

Q. At the French Hotel? A. Yes.

Q. Do you remember what sort of a bond it was?

A. No, I don't. Mr. Brown and Mr. Nash, I believe, was handling that; Mr. Brown got the case report on it, and he wrote the case up, Mr. Brown did, and I could not say just exactly what kind of a bond it was.

Q. Now who was this young fellow who started to run?

A. I can't recall his name, they called him Doc.

Q. Did you detain him as a witness?

A. I didn't understand you.

(Testimony of P. E. DuBois.)

Q. Did you keep him as a witness?

A. No, sir.

Q. Did you find out his name? A. No, sir.

Q. You say there were two other men standing before the bar when you went in?

A. Yes, sir.

Q. Did you find out who they were?

A. I did not; the doctor was one of them. [72]

Q. This man you call Doc?

A. The man they called Doc, yes.

Q. And of your own knowledge you don't know what was in these glasses?

A. Well, the glasses, when I came back I smelled the odor that was in them; one appeared to have wine in, and the other seemed to be whiskey, the small one from the odor of it; I came back, I suppose it was a few minutes, and the boys had the glasses in their hands at that time; Mr. Brown had the glasses.

Q. Did you put these labels on the glasses?

A. No, I didn't say that I labeled the glasses; the bottles.

Q. Who labeled these glasses, if you know?

A. I don't know.

Q. Are your initials on there, in any place?

A. No.

Q. Do you see your initials on that one?

A. No, sir.

Q. On this one? (Handing to witness.)

(Testimony of P. E. DuBois.)

A. No, sir; I looked at that one.

Q. So you don't know anything about these glasses?

A. I didn't label those at all.

Q. But you labeled the bottles? A. Yes, sir.

Q. You retained the evidence yourself?

A. Yes, sir, I took the evidence out of there; it was in my possession until I turned it over to Professor Dinsmore.

Q. What did you retain as evidence, and what did you turn over to Professor Dinsmore?

A. I turned those two bottles over to the Professor.

Q. That don't include the three glasses?

A. Well, I turned three glasses over, and they look to be the same glasses, the same three glasses; one had a piece out of it.

Q. You gave Professor Dinsmore these two bottles?

A. Yes, those two bottles, and three glasses.

Q. How do you know these are the same bottles you turned over to [73] Professor Dinsmore?

A. It is the label I put on, and I put my initials on there.

Q. What are your initials?

A. P. E. D. Right here (indicating).

Q. And you labeled them at the time?

A. Yes, sir, I put my initials on these as a rule, if they are put on at all they are put on immediately

(Testimony of P. E. DuBois.)

after they are labeled, while they are in my possession.

Q. You put them on this bottle?

A. I did; here they are (indicating on bottle).

There was more in that bottle than there is now.

Mr. PATRICK.—I move to have that stricken.

The COURT.—It may go out.

Mr. PATRICK.—(Q.) This occurred after midnight on the 20th; where did you keep these bottles, and what time did you turn them over to Professor Dinsmore?

A. On the morning of the 21st, about eleven o'clock.

Q. The 21st? A. Yes, sir.

Q. Wasn't the search made on the evening of the 19th?

A. It was made after midnight of the 19th, near midnight, probably three or four minutes after twelve when we entered there.

Q. You didn't depart from there on the 20th?

A. The 21st.

Q. No, on the 20th; aren't you wrong, Mr. DuBois; the date on this bottle is March 19th; does that mean after midnight of the 18th?

A. That was so near the 19th I suppose I put it the 19th; it was supposed to be just at midnight, or just before midnight, or the date would not have been on it; it was the 21st when I turned it over to Professor Dinsmore.

(Testimony of P. E. DuBois.)

Q. You held them in your possession over a day?
[74]

A. Yes, I did; they were sealed and labeled, and turned over to him sealed and labeled.

Q. I want to get this right; you entered there on March 19th, and left there on March 20th, is that right? A. Yes.

Q. And on March 21st you turned the bottles over to Professor Dinsmore? A. Yes.

Q. Why didn't you turn them over the same day?

A. I guess I was busy; there was considerable work on hand at that time; there is times that the Professor is out and we can't get hold of him.

Q. Who sealed those bottles?

A. Mr. Brown and myself.

Q. They were sealed in your presence?

A. Yes.

Q. Were the seals intact when you took them to Professor Dinsmore? A. They were.

Q. How did you seal them?

A. We used wax, and the U. S., and put the stamp on top.

Mr. PATRICK.—That is all.

Mr. SPRINGMEYER.—That is all.

Testimony of H. P. Brown, for Plaintiff.

Mr. H. P. BROWN, called as a witness by plaintiff, having been previously sworn, testified as follows:

Direct Examination by Mr. SPRINGMEYER.

Q. Your name is H. P. Brown? A. Yes, sir.

Q. You are now, and have been for several years.
a Federal Prohibition Agent for Nevada?

A. Yes, sir.

Q. Were you present on the occasion of a raid by prohibition agents upon the French Hotel at Gardnerville, Douglas County, Nevada, on the night of March 19th, or early in the morning of March the 20th, 1922. A. Yes, sir.

Q. About what o'clock was it? [75]

A. Well, it was around twelve o'clock somewhere, very close after twelve.

Q. Who were the prohibition officers engaged in the raid?

A. Mr. Carter, Mr. DuBois and myself.

Q. Before you went in did you or any of the three do anything?

A. Yes, sir, Mr. Carter and I looked through the window.

Q. What, if anything, did you see?

A. We saw two men standing at the bar drinking, and saw this gentleman behind the bar, Mr. Borda, and some money on the bar, a piece of silver.

Q. What were they drinking?

(Testimony of H. P. Brown.)

A. One was drinking wine, and the other one was drinking jackass brandy.

Mr. PATRICK.—(Q.) Did you know that at the time when you were looking through the window?

A. No, sir, we did not.

Mr. PATRICK.—I move the answer be stricken out.

The COURT.—It may go out.

Mr. SPRINGMEYER.—(Q.) Did you find later on what they were drinking? A. Yes.

Q. How did you discover what they were drinking? A. I took the wine out of their hand.

Q. What happened it when you took it out of their hand?

A. Spilled in the scuffle trying to catch Mr. Borda.

Q. Where did you spill it? A. On the bar.

Q. Do you know what the color of the liquid in the glasses was? A. Yes.

Q. What was the color?

A. The wine was a reddish color, and the liquor was a pale dark brown.

Q. How did it smell?

A. Alcoholic smell. [76]

Q. Were you at that time familiar with the smell of wine and the smell of whiskey? A. Yes, sir.

Q. What did you say was on the bar in the way of money?

A. I could not say whether it was a dollar or four bits; it was a piece of silver.

Q. When you went in what happened?

(Testimony of H. P. Brown.)

A. Why, I ran and took the glass of wine out of the fellow's hand, and Mr. Carter took the glass of liquor out of the other fellow's hand; and I made a grab at Mr. Borda so he could not destroy any evidence if there was any behind the bar.

Q. Go on.

A. Mr. Carter then went behind the bar, and I went back to the kitchen, where we found it once before; I thought that would be the place where they would have some stored; and Mr. Carter hollered to me, and I came out, and he pulled a half pint bottle of liquor out of a rubber; and then he went behind the bar, on the drain-board, and lifted up a quart bottle containing wine.

Q. Would you recognize the glasses and bottles if you saw them? A. I think I would.

Q. Do you know what was done with them?

A. Yes, sir.

Q. What?

A. They were sealed right there in the presence of these defendants, put in the car, and handed over to Mr. Dinsmore for analysis.

Q. The glasses also? A. Yes, sir.

Q. Who sealed the bottles?

A. Mr. DuBois and I.

Q. Do you know whether or not anybody put initials upon the bottles? A. Yes, sir.

Q. Who did?

A. Mr. Nash, Mr. DuBois and myself.

Q. Please examine these exhibits and state

(Testimony of H. P. Brown.)

whether they are the bottles and the glasses which were taken on that occasion? [77]

A. That was the bottle that was on the drain-board behind the bar; there was more wine in it than there is now, though.

Q. That is exhibit number 3 for identification.

A. And this is the half pint flask Mr. Carter pulled out of the rubber. (Indicating.)

Q. Exhibit 4 for identification.

A. I could not swear that those are the glasses; we didn't label them; they were glasses just similar to those; similar glass that I took out of this fellow's hand who was drinking. I say that glass there is similar; we didn't label them; it is a similar glass to the one I took out of the fellow's hand at the bar.

Q. How about these other two glasses?

A. This had water in (indicating), a chaser; and this one had brandy.

Q. Similar glasses to those? A. Yes.

Q. You said you did not label those glasses?

A. No, sir, put them in with the other evidence.

Q. And turned them over to Professor Dinsmore? A. Yes.

Q. Did you have any conversation, or was any conversation had, with either of these defendants in your presence on that occasion? A. Yes.

Q. Between whom and what was the conversation?

A. I asked Mr. Borda if he was the proprietor, and he told me he wasn't; I asked him who was, and he told me this gentleman here (indicating); I asked

(Testimony of H. P. Brown.)

him where the proprietor was, and he said "Up in his room," and I had Mr. Borda come up and show me where his room was, and he was in bed.

Q. Is that the gentleman seated on Mr. Patrick's right?

A. Yes. I asked him if he was the proprietor, and he told me that he was, and I told him he would have to put up bonds, and we waited around a few minutes, and I asked him the second time if he was going to put up bonds, and he went over to his safe. [78]

Q. You brought him down from his bedroom did you? A. I did.

Q. Did he open the safe?

A. About that time someone else came in, and went on his bond.

Mr. SPRINGMEYER.—You may cross-examine.

Cross-examination.

Mr. PATRICK.—(Q.) You were a witness in the case against these two defendants before, were you not? A. I was.

Q. At that time did you not state that the defendants were taken over to Minden, and gave bond there? A. They were.

Q. Did you give bond in Minden or in the French Hotel in Gardnerville?

A. I think we let it go right in the French Hotel; some fellow, I can't recall his name now, went on their bond.

Q. Mr. Brown, is that his name?

A. I really could not tell you what his name was.

(Testimony of H. P. Brown.)

Q. You took them to Minden, did you?

A. That I don't remember.

Q. Didn't you testify in the former case you did take them to Minden? A. I don't remember.

Q. As a matter of fact, the bonds were given there in the French Hotel in Gardnerville, as you remember now?

A. There was a fellow came in there, and was going to vouch for the appearance of those two gentlemen before the United States Commissioner; what his name is I do not know.

Q. At that hearing do you know what evidence was produced on behalf of the United States in the way of bottles, and things of that sort?

A. I remember there was some evidence produced at the time of the hearing. [79]

Mr. SPRINGMEYER.—Object on the ground it is not cross-examination; nothing of the kind was gone into on direct examination with reference to the preliminary hearing. I don't think it is necessary to take up the time on that.

Mr. PATRICK.—I am not asking about the preliminary hearing.

Q. You were a witness in this case about a month ago against these same defendants? A. Yes.

Q. Is this the bottle produced in evidence then?

The COURT.—Is that the question?

Mr. SPRINGMEYER.—I think you said at the preliminary hearing.

Mr. PATRICK.—No.

Mr. SPRINGMEYER.—He is not qualified

(Testimony of H. P. Brown.)

to answer; he doesn't know whether it was produced in evidence or not.

Mr. PATRICK.—Well, I ask if you know.

Mr. SPRINGMEYER.—I object as not proper cross-examination.

The COURT.—I don't think it is proper cross-examination.

Mr. PATRICK.—I withdraw the question, and will go ahead another way.

The COURT.—If you are going to use it to contradict something he stated at that time, that would be another matter; but I don't understand you intend to impeach him on that ground?

Mr. PATRICK.—No, I don't intend to contradict Mr. Brown on any point; I never found it necessary.

Q. Mr. Brown, was that bottle in your possession after you took possession of it; I mean the one with the red liquor in it? A. Yes, sir.

Q. Until it was turned over to Professor Dinsmore?

A. Not in my possession; Mr. DuBois took charge of it after we came from Minden.

Q. Who gave it to Mr. DuBois? [80]

A. Well, we all gave it to him; we were all in the party; he took charge of it.

Q. And after it was sealed in the presence of these defendants, you turned it over to Mr. DuBois?

A. In our car; we had the one car, and driving home we passed Mr. DuBois' house first on the way home to Reno, and we told him he had better take the evidence and keep it at his house all night.

(Testimony of H. P. Brown.)

Q. You don't know anything at all about it being turned over to Professor Dinsmore?

A. No, sir, I do not.

Q. The only thing you can say about these two glasses is that they are similar glasses to the glasses on the bar when you went in?

A. Exactly the same kind of glass, yes, sir.

Q. What about this broken glass; what do you know about that?

A. That is just a supposition that that was a chaser for the brandy.

Q. And that contained water at the time you went in? A. Yes, sir.

Q. There were three glasses, and two men standing before the bar? A. Yes, sir.

Q. And your supposition is that one contained water?

A. Well, we smelled it carefully; I smelled it carefully, and there was no odor of alcohol in it.

Q. Did you bring a sample of what you claim to be corn whiskey and wine into court?

A. No, sir, I spilled the wine when I grabbed it out of the man's hand; when I had the scuffle with Mr. Borda I spilled it.

Q. What became of the corn whiskey?

A. Mr. Carter was handling that.

Q. You didn't take a sample of either?

A. No, sir. [81]

Q. Now this was about twelve o'clock?

A. Very close to twelve o'clock.

Q. And Mr. Bilboa was in bed? A. Yes.

(Testimony of H. P. Brown.)

Q. Did Mr. Borda make any attempt to get away, or anything of the sort? A. No, sir.

Q. Did he make any attempt to destroy evidence?

A. No.

Q. You seized that for some reason?

A. Well, I played safe, so that he would not, and I grabbed hold of his shirt.

Q. Was that in front of the bar or behind the bar?

A. He was behind the bar, and I was on top of the bar.

Q. And you grabbed hold of his shirt so he would not have an opportunity to destroy any evidence?

A. Yes. Usually in a case when we enter that way, they usually run to destroy the evidence, and to prevent that I grabbed his shirt.

Q. He didn't make any resistance to you, did he?

A. None whatever.

Q. When you asked him if he was the proprietor, and he said he was not, he gave you the name of the proprietor? A. Yes.

Q. And you asked him to go upstairs with you?

A. Yes.

Q. Into Mr. Bilboa's room? A. Yes, sir.

Q. And in what condition did you find Mr. Bilboa?

A. He was in bed.

Q. Was he undressed? A. He was undressed.

Q. In bed and asleep?

A. I don't know whether he was asleep or not; he was in bed.

Q. What did you ask Bilboa up in the room?

(Testimony of H. P. Brown.)

A. When the three of us were together I asked him if he was the proprietor.

Q. What did he say? A. He told me he was.

Q. Did you ask him to come downstairs, or did he come down of his own volition?

A. I told him to come down, and he came on down; I came down ahead of him and he came down behind me; I told him to wait until he got dressed, and he waited and came down behind me.

Q. Now, outside of these two bottles what liquor did you find in the establishment?

A. We found some patent stuff there, I can't recall the name of it.

Q. Hufeland Bitters? A. Yes.

Q. That was the same that was introduced at the last trial here? A. Yes, sir.

Q. Did you find any other stuff beside the Hufeland Bitters?

Mr. SPRINGMEYER.—Object on the ground it is not proper cross-examination. They were not asked if they found any other liquor; they were only asked regarding these particular liquors.

The COURT.—Objection overruled. The question may come up later as to your right to contradict this testimony, or to explain it. I think you have a right to draw out all that occurred at that time as a part of the *res gestae*. Of course this is a peculiar case because you know exactly what the witness will testify to, and I assume you are drawing it out for some purpose.

(Testimony of H. P. Brown.)

Mr. PATRICK.—I will get at it in a different way, and withdraw my question.

Q. How thorough a search did you make of the premises, you and the rest of you?

A. Well, a pretty good search, I should judge.

Q. As thorough as possible? [83]

A. As I knew how; yes, sir.

Q. And after the search you told these people they were under arrest, and they arranged to give bond? A. Yes, sir.

Mr. PATRICK.—That is all.

Testimony of S. C. Dinsmore, for Plaintiff.

Mr. S. C. DINSMORE, called as a witness by plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. SPRINGMEYER.

Q. Your name is S. C. Dinsmore, is it not?

A. Yes, sir.

Q. You have been for a number of years analytical chemist and pure food and drug inspector for the State of Nevada? A. Yes.

Q. You have also been engaged in making analyses of liquor samples for the prohibition force, have you not? A. Yes.

Q. Did you on or about the 20th or 21st day of March, of this year receive any liquor samples with markings on them, concerning one Bilboa and Borda? A. I did.

Q. Will you please examine exhibits for identification, one, two, three, four and five, and state whether those are the samples you received?

(Testimony of S. C. Dinsmore.)

A. Those are the ones.

Q. From whom did you receive them?

A. I received them from Mr. DuBois.

Q. What was the condition of the bottles?

A. They were sealed; each bottle had a certain amount of liquor in it; I took them into the laboratory, broke the seals, and made analyses.

Q. What was done with the glasses?

A. They were delivered at the same time the bottles were turned over to me. [84]

Q. In whose possession have these glasses and bottles been since that occasion?

A. They have been in my possession until the time they were turned over to the United States Marshal here.

Q. And does that include the glasses? A. Yes.

Q. What was the result of your analysis of exhibit 3 for identification, in the way of showing alcoholic content?

A. It was 16.52 per cent of alcohol.

Q. What would you say that was, Professor Dinsmore? A. I classed it as wine.

Q. Was it fit for use for beverage purposes?

A. I would say it was.

Q. What was the result of your analysis of Plaintiff's Exhibit Number Four for identification?

A. 42.12 per cent of alcohol.

Q. Did it contain any fusil oil?

A. A small amount.

Q. What is that called?

A. I classed that as corn whiskey.

(Testimony of S. C. Dinsmore.)

Q. Could you tell how old that is?

A. No, I could not positively.

Q. Do you know whether it was made since or before the National Prohibition Law went into effect?

A. I don't know, but from the nature of the analysis I would say it was made since the Prohibition Law went into effect.

Q. There was no such liquor as that made before that, was there? A. I never ran across any.

Q. That is not bonded liquor, is it? A. No.

Q. Is that fit for use for beverage purposes?

A. I would say it could be used for beverage purposes.

Mr. SPRINGMEYER.—I offer in evidence exhibits 1, 2, 3, 4 and 5, marked for identification; and ask that they be marked as exhibits in accordance with the identification marks. You may cross-examine. [85]

The COURT.—Have you any objection?

Mr. PATRICK.—I object to the introduction at the present time, until I am through with the cross-examination of this witness.

Cross-examination.

Mr. PATRICK.—(Q.) What do you mean by bonded goods?

A. Liquor that has been held in a Government warehouse for a period of years, and let out from the warehouse by Government authority.

Q. Held under bond. And you say this contained a small amount of fusil oil?

A. A small amount of fusil oil.

(Testimony of S. C. Dinsmore.)

Q. Whiskey that was made before the Prohibition Act went into effect had fusil oil, did it not, Professor? A. Yes.

Q. (The Court admonishes the jury and at 12:00 o'clock a recess is taken until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

(All parties present. The Clerk calls the roll of jurors.)

Cross-examination of Mr. S. C. DINSMORE (Resumed).

Mr. PATRICK.—(Q.) Professor Dinsmore, you testified this morning with regard to two exhibits contained in bottles, the two bottles I hold in my hands; you testified as to their alcoholic content, that you made an examination of them. There seems to be only a remnant of liquid in this bottle; was that all that was in the bottle when you received it?

A. No.

Q. How much was there?

A. There was about a hundred cubic centimeters altogether; that would be about one-fourth full.

Q. About one-quarter full?

A. About one-quarter full. [86]

Q. How much liquid was in the other bottle when you received it?

A. There was 175 cubic centimeters; that was about a quarter full.

Q. About a quarter full?

A. About a quarter full.

Q. You measured the contents of each of them?

(Testimony of S. C. Dinsmore.)

A. No, just what I took out.

Q. You took about a hundred?

A. I took out about a hundred cubic centimeters.

Q. A centimeter is how much?

A. Well, in weight it is one gram, twenty-five grams to the ounce.

Q. You testified on the former trial of these defendants? A. Yes.

Q. Did you testify as to the contents of this bottle?

A. (Mr. SPRINGMEYER.) Objected to on the ground it is not cross-examination, and immaterial.

Mr. PATRICK.—I will wait until your Honor rules.

The COURT.—Very well. Are you introducing this for the purpose of contradicting previous testimony, or is it for the purpose of putting in your own evidence?

Mr. PATRICK.—Putting in my own evidence.

The COURT.—Then I will have to sustain the objection.

Mr. PATRICK.—Then I desire to make Professor Dinsmore my own witness.

Mr. SPRINGMEYER.—Have you finished your cross-examination?

Mr. PATRICK.—Not yet.

Mr. SPRINGMEYER.—I would like to have the offer ruled on.

The COURT.—I think you had better conclude your cross-examination, Mr. Patrick, then make him your own witness. I will not refuse to allow you to

(Testimony of S. C. Dinsmore.)

examine him as a witness in chief after you have finished the cross-examination; but it can't go in as part of the case in chief of the prosecution. [87]

Mr. PATRICK.—That is all.

Mr. SPRINGMEYER.—We would like to have a ruling on the offer of the bottles and glasses.

Mr. PATRICK.—We object to the introduction of them, because I expect to show at the present time that this bottle, the larger bottle, has been out of the possession of the Government for some time. Before I conclude my cross-examination I want to ask one more question.

Q. Professor Dinsmore, after taking what you said you took out of these bottles, did you seal them up again? A. Yes.

Q. Put your own seal on them? A. Yes.

Q. Show me which is your seal?

A. This paper seal is the seal that I put on this bottle here. This bottle here was resealed with red wax, and I broke that seal myself this morning.

Q. You didn't put a paper seal on that?

A. No, I did not.

Q. For what reason? Is it your habit always to put a red wax seal on everything?

A. Not always.

Q. What sort of red wax seal was it?

A. Just ordinary red wax, used for that purpose.

Q. Any impression made on the wax?

A. No, I didn't make any impression; that was there when I received the bottles.

Mr. PATRICK.—That is all.

(Testimony of S. C. Dinsmore.)

Mr. SPRINGMEYER.—(Q.) When I took the bottle out when Mr. Carter was on the stand, before he looked at his initials on the bottle, you took your knife and dug the seal, didn't you?

A. I broke the seal myself this morning.

Mr. SPRINGMEYER.—I now ask that the Court rule on the offer.

The COURT.—They will be admitted.

Mr. PATRICK.—I save an exception. [88]

(The exhibits marked for identification are admitted in evidence, and marked Plaintiff's Exhibits Nos. 1, 2, 3, 4 and 5.)

Mr. SPRINGMEYER.—That is all. The Government rests.

Mr. PATRICK.—Call Mr. Dinsmore as a witness.

DEFENDANTS' EVIDENCE.

Testimony of S. C. Dinsmore, for Defendants.

Mr. S. C. DINSMORE, called as a witness by defendants, testified as follows:

Mr. PATRICK.—(Q.) Professor Dinsmore, in the trial of the case, the former action against Bilboa and Borda, were you a witness for the Government?

A. I was.

Q. Did you testify at that time in regard to analyses of certain materials produced to you?

A. I did.

Q. Did you testify as to the contents of that bottle before you?

Mr. SPRINGMEYER.—Objected to as immaterial. This is a different offense charged, may it

(Testimony of S. C. Dinsmore.)

please the Court. The fact that it is against the same defendants does not make it incumbent on the Government to introduce the same evidence in both cases; they are at different dates, and it is immaterial.

The COURT.—I will allow the question.

A. No, I did not.

Mr. PATRICK.—That is all.

Mr. SPRINGMEYER.—(Q.) Did the United States Attorney or his assistant ask you for that bottle?

Mr. PATRICK.—If the Court please, I object to it as hearsay.

Mr. SPRINGMEYER.—It is not hearsay.

The COURT.—That is a question of fact.

Mr. PATRICK.—Self-serving evidence.

The COURT.—That is a question as to a fact, as to whether the bottle was called for or not.

Mr. PATRICK.—Very well, I withdraw the objection.

Mr. SPRINGMEYER.—(Q.) What is the fact?
[89]

A. What is the question?

Q. Did the United States Attorney or his assistant ask you for that bottle at the previous trial?

A. No.

Q. Did not call upon you for it at all?

A. No, sir.

Mr. SPRINGMEYER.—That is all.

Mr. PATRICK.—That is all. Mr. Bilboa, take

(Testimony of S. C. Dinsmore.)

the stand. We desire to have an interpreter for Mr. Bilboa, and also for Mr. Borda.

Mr. SPRINGMEYER.—I think Mr. Bilboa can get along very well. My recollection is the last time he got along better without an interpreter than he did with one. Ask the questions, and if he fails to answer properly, then have an interpreter. I am satisfied these defendants can get along without an interpreter.

The COURT.—If they have to have an interpreter, are you satisfied with the one we had before?

Mr. SPRINGMEYER.—Yes, may it please the Court.

The COURT.—Which one do you propose to examine first?

Mr. PATRICK.—Mr. Bilboa.

Testimony of J. Bilboa, in His Own Behalf.

J. BILBOA, one of the defendants, called as a witness in his own behalf, after being sworn, testified as follows:

The COURT.—Now you may question him if you wish, Mr. Springmeyer.

Mr. SPRINGMEYER.—(Q.) What is your name? A. J. Bilboa.

Q. How long have you lived in the United States?

A. Oh, about since 1907.

Q. What have you been doing since that time?

A. Working sheep.

Q. Anything else?

A. That is all, and farm sometimes.

(Testimony of J. Bilboa.)

Q. Did you ever run a hotel in Gardnerville?

A. I did. [90]

Mr. SPRINGMEYER.—May it please the Court, I think he gets along nicely.

WITNESS.—Well, I can't—well, if I get along all right, it is all right.

Q. You talk English to men in the hotel and on the sheep ranch all the time, don't you?

A. Sometimes.

Q. You go in the stores and buy things, don't you?

A. Yes.

Q. You have been doing that for years; you talk English when you go in stores, don't you?

A. Yes, I do.

Q. You don't have any trouble in making them understand what you want, do you?

A. Yes, I do.

Q. Well, you get what you want usually, don't you? A. Well, sure.

Q. You talk English every day, don't you, to somebody? A. Yes.

Q. You have been talking English every day to some one for a good many years, haven't you?

A. Yes, some.

Q. You have been in this country since 1907?

A. Yes.

Mr. SPRINGMEYER.—I submit, may it please the Court, that an interpreter is not necessary. I think, in all fairness, that a witness who understands the language as well as this witness, should be compelled to speak the language of the court.

(Testimony of J. Bilboa.)

The COURT.—Do you insist on an interpreter?

Mr. PATRICK.—I think we ought to have one.

The Court.—Well, you may have him for your examination; but I shall not restrict the District Attorney, if he wishes to examine the witness without an interpreter I shall allow him to do so.

E. ARANDA is sworn as interpreter, to interpret from English into Spanish, and from Spanish into English.

The COURT.—Do you want the oath administered to the witness by the interpreter, or are you satisfied that he understands [91] the oath?

Mr. PATRICK.—Did you understand the oath, when you raised your hand to swear? Ask him if he understood what the Clerk was saying to him when he raised his hand?

INTERPRETER.—He says yes.

Q. He knows he was sworn to tell the truth, the whole truth and nothing but the truth. A. Yes.

The COURT.—Ask him what he was sworn to testify to; ask him what the oath was? A. Yes.

Q. Ask him what it was, not yes, but ask him what it was that he was sworn to do. Can you put that question to him? A. Yes, I can.

Q. Well, just put the question to him.

A. He says to tell the truth, and nothing but the truth.

The COURT.—Go on.

Direct Examination by Mr. PATRICK.

Q. State your name; what is your name?

A. E. Aranda.

(Testimony of J. Bilboa.)

Q. You interpret the question to Mr. Bilboa.
What is your name? Ask him that.

A. J. Bilboa.

Q. Where do you live?

A. In Gardnerville now.

Q. How long have you lived in Gardnerville?

A. He lived in Gardnerville since 1909.

Q. How long have you lived in this country?

A. Since 1907.

Q. Has he been in the hotel business in Gardnerville?
A. He is in the hotel business now.

Q. How long? A. Since last summer.

Q. What hotel? A. French Hotel.

Q. What business does he conduct in that hotel?

A. He has got a saloon and a boarding-house.

[92]

Q. What sort of drinks does he sell in the saloon?

A. Soft drinks.

Q. Does he have rooms for rent in the hotel?

A. Yes, he has.

Q. How many rooms? A. Ten rooms.

Q. Was he in the hotel on the night of the 19th of March?
A. Yes, he was.

Q. Where? A. He was in bed.

Q. What time did he go to bed?

A. About eleven o'clock.

Q. Did anybody come to his room about twelve o'clock, or after twelve o'clock that night?

A. He says that was on the 19th of March, after twelve o'clock.

(Testimony of J. Bilboa.)

Q. Did anybody come to his room on the 19th of March, after twelve o'clock. A. Yes.

Q. Who?

A. A man by the name of Brown, and William Borda.

Q. What did Brown say to him?

A. Brown asked him if he was the proprietor, and he answers he is.

Q. He answered he was? A. He was.

Q. What did he do then?

A. He didn't do nothing; but Brown tell him that he was under arrest, he told him to come down from his room.

A. He made him put up the bond.

Q. No, did he come downstairs?

A. He come down after he was called by Brown.

Q. When he got downstairs did he see Brown and DuBois there? A. He saw him, yes.

Q. What were they doing?

A. He said one had some kind of a beverage, Hufeland, or some kind of name like that, and the other had some glasses—bitter.

Q. Ask him if any of them had either of these bottles? Who had that small bottle? [93]

The COURT.—Did he answer that question?

A. He didn't know nothing about it.

The COURT.—Do you hear the witness?

Mr. PATRICK.—Do you hear what he says?

The COURT.—When I ask you a question, Mr. Interpreter, you are to answer it; you are not to look around to anybody else to see whether it is

(Testimony of J. Bilboa.)

proper to answer my question or not. Now I asked you if you heard this witness? A. Yes.

Q. Answer it then.

A. Will you repeat the question?

Q. I asked you whether you were able to hear the witness or not. That is a very simple question, and if you are an interpreter you ought to be able to understand it and answer it. A. Yes.

Q. Why didn't you answer it in the first place?

A. He started to speak before I could give you an answer.

The COURT.—Go on.

Mr. PATRICK.—(Q.) Ask him if he saw either of those two bottles, or both of them, that night when he came downstairs? What did he say?

A. He says he don't know; they told him that they found a small bottle in the rubber shoe.

Q. He didn't understand the question. Ask him when he came downstairs if he saw either of those bottles in the possession of the officers or anybody else? What did he say?

A. He says he don't know nothing about that. He don't get the question right.

Q. Well, we will take one bottle away, and maybe he will understand. When you came downstairs did you see this bottle? A. No.

Q. Did the officers never show you this bottle?

A. He don't know. [94]

Q. Did you ever own that bottle?

A. He don't know.

Q. Were there any overshoes?

(Testimony of J. Bilboa.)

The COURT.—What was the answer to that question? A. He don't know.

Mr. PATRICK.—(Q.) Were there any overshoes at the end of the back-bar that night or that morning when he came downstairs?

A. He said there were several pairs of rubber shoes.

Q. Several pairs of overshoes?

A. Of overshoes.

Q. Does he know how that bottle got into an overshoe? A. He don't know.

Q. Did he ever put it there himself? A. No.

Q. Did he ever see that bottle on the morning of the 20th of March? A. He says no.

Q. Did the officers seal these bottles in his presence? A. He didn't see it.

Q. Did you ever have any whiskey in your premises, corn whiskey? A. He says no.

Q. Ask him how long his establishment is open, from what time in the morning until what time at night?

A. He is generally open at six o'clock, and close close to one o'clock.

Q. The doors are open all that time?

A. Repeat the question.

Q. Doors open all that time?

A. He says when he went to bed at eleven o'clock the doors were yet open.

Q. I mean as a rule were the doors open from six in the morning until he closed at night, as a general rule; ask him? A. He says yes.

(Testimony of J. Bilboa.)

Q. People were free to come in there?

A. Repeat your question. [95]

Q. People are free to come and go as they please in there? What does he say?

A. He says lots of people go in and out; that is what he say.

Q. And that has been the custom ever since he opened the place? What did he say?

A. He said yes, they come in for drinks, they come into the dining-room, and somebody else ask him for a room.

Q. Ask him if he knows what a public place is?

A. He don't understand that question.

Q. That is what I have been trying to get at. Ask him if he owned that bottle? A. He says no.

Q. Ask him if he ever sold any alcoholic drinks in that place since he opened it? A. He says no.

Q. Did he ever buy any alcoholic drinks for sale in there?

A. He says he bought a case of Hufeland in Carson at one time.

Q. That is the only thing.

A. That is the only thing.

Q. Ask him who waits on customers?

A. He says he has got a bartender to serve the customers, and he serves customers.

Q. Do you know whose overshoe it was that this bottle was found in? A. He don't know.

Q. Did he ever place any bottle in an overshoe?

A. He says no.

Mr. PATRICK.—That is all.

(Testimony of J. Bilboa.)

Cross-examination.

Mr. SPRINGMEYER.—(Q.) Do you know Brown, prohibition officer?

WITNESS.—(A.) I hear him call me when I was in bed.

Q. He called you when you were in bed??

A. Yes.

Q. He went up to your bedroom with Mr. Borda here, didn't he? A. Yes.

Q. The two of them went up there together?

A. Yes. [96]

Q. Did you tell Mr. Brown that you were the proprietor? A. Yes, I told him that.

Q. Did you tell him that Borda was your bar-keeper?

A. I no told him like that; he don't ask me that question.

Q. Borda was your barkeeper, was he not?

A. He working there.

Q. How long had he been working there?

A. Since last fall.

Q. Did you go downstairs with Mr. Brown?

A. Yes, after he come downstairs; he tell me to get up, as soon as I can I went down.

Q. Did you see Mr. Brown downstairs?

A. Yes, I see him.

Q. And Mr. Carter? A. I see him.

Q. Three men?

A. Three men, and lots of fellows come besides.

Q. Did Mr. Brown tell you they found this bottle in the rubber?

(Testimony of J. Bilboa.)

A. He tell me he find it, but I don't know.

Q. You saw this bottle there that time, did you not? A. I don't know.

Q. Well, it was like this bottle, was it not?

A. No.

Q. He told you they found a bottle like this?

A. Told me they found the liquor when I was in bed, that is all.

Q. Did he tell you they found this bottle there, too? A. He don't tell me.

Q. Did you see this bottle on the bar?

A. No, I don't know.

Q. Did you see any bottle on the bar?

A. I can't say.

Q. Did you see anything on the bar? A. No.

Q. You did not see anything on the bar?

A. No, sir.

Q. Did Mr. Brown tell you you were arrested?

A. He arrest me.

Q. Did he tell you what for?

A. He says I was coming upstairs find liquor, I was arrest. [97]

Q. He told you he found liquor?

A. That is what he tell me.

Q. Did he show you the bottle?

A. He didn't say nothing.

Q. Did he show you any glasses?

A. Didn't show me.

Q. Didn't show you anything, but he did tell you they found that whiskey in a rubber overshoe, is that right? A. Yes.

(Testimony of J. Bilboa.)

Q. Didn't he tell you anything about wine?

A. No.

Q. Did he tell you anything about whiskey glasses like this (indicating)?

A. I don't know about them.

Q. You see these glasses? A. Yes.

Q. Did you have glasses like this?

A. That is the kind of glasses, I don't know.

Q. That is the kind of glasses you had in your bar-room at this time. A. Lots of kind of glasses.

Q. Like this? A. I don't know like that.

Q. Was Mr. Borda working for you on that night? A. Yes, sir.

Q. Did you leave him downstairs when you went to bed? A. Yes, sir.

Mr. SPRINGMEYER.—That is all.

Mr. PATRICK.—That is all.

Testimony of William Borda, in His Own Behalf.

WILLIAM BORDA, one of the defendants, called as a witness in his own behalf, sworn through the Interpreter, FRED URDABURN, who has been previously sworn as interpreter, testified as follows:

Direct Examination by Mr. PATRICK.

Q. What is your name? A. William Borda.

Q. Where do you live? A. Gardnerville.

Q. For whom do you work?

A. Well, I stop French Hotel.

Q. Who runs the French Hotel? A. Bilboa.

[98]

Q. What is his regular occupation at the French

(Testimony of William Borda.)

Hotel? A. His wife is working there.

Q. What does he do for Bilboa? A. Cooking.

Q. Does he ever work in the soft drink establishment? A. Yes, he sell soft drinks.

Q. Was he there on the 19th of March?

A. Yes.

Q. What was he doing on that night?

A. Just helping him; he was helping.

Q. Where was Bilboa?

A. He says he was going to bed himself, Bilboa; and he was helping there.

Q. He was just going to bed himself at that time?

A. Yes.

Q. Were there any people in that establishment at that time? About twelve o'clock that night?

A. Yes.

Q. What were they doing?

A. Some talking and some drinking.

Q. Did he wait on two men that night, just before the officers entered? A. Yes.

Q. How many people did he wait on when the officers entered? A. Two.

Q. What did he serve them?

A. One O. T., and the other one grape juice.

Q. Did they pay for the drinks? A. Yes.

A. Was there a man called Doc in that saloon at the time? A. Yes.

Q. Was he one of the two that was being served with drinks? A. Yes.

Q. Where were the drinks when the officers entered? A. End of the bar.

(Testimony of William Borda.)

Q. On the bar? A. End of the bar.

Q. What did the officers do?

A. He says they got in and Mr. Brown jump over the bar, and tear his shirt to pieces. [99]

Q. What else did they do?

A. They were just looking around; he don't know, he never go from the saloon.

Q. Ask him when he first saw that small bottle there? A. He says no.

Q. Ask him when he first saw it, if he saw it that night? A. He says no.

Q. Didn't you see Mr. Carter find that bottle? A. No.

Q. Did he place that bottle in the overshoe?

A. No.

Q. Did he know that bottle was in the overshoe?

A. No.

Q. Ask him if they had large bottles like that, or bottles like that large bottle in the establishment?

A. He says they got several bottles, several empty bottles, but he don't know this bottle.

Q. Ask him if he ever sold any alcoholic liquor in that place? A. No.

Q. Has he ever furnished any alcoholic liquor for sale? A. No, he never did.

Q. Did he see the officers take this large bottle?

A. No.

Q. Ask him what sort of glass he served the O. T. in? A. That size of a glass (indicating).

(Testimony of William Borda.)

Q. What sort of a glass did he serve the grape juice in? A. That kind of a glass (indicating).

Q. What did the officers say to you when they came in? A. What he was doing there.

Q. What did he tell them?

A. He was just servant.

Q. Did they ask for the proprietor? A. What?

Q. Did they ask for the owner? A. Yes.

Q. What did he tell them?

A. He says the boss, he was in bed.

Q. What did he do then?

A. He went up to the room himself. [100]

Q. And what else?

A. He went with Mr. Brown.

Q. What did he do then? A. He get Bilboa.

Q. And Bilboa and Brown come downstairs?

A. Yes.

Q. Did the officers make any arrests? A. Yes.

Q. Did they give bond? A. He give bond.

Mr. PATRICK.—That is all.

Cross-examination.

Mr. SPRINGMEYER.—(Q.) Do you know Brown? Wait a moment, I will talk to him. Did you know Brown?

WITNESS.—I can't understand.

Q. You talked English that night, didn't you?

A. No.

Q. Did Brown ask you where the owner was?

A. Can't understand.

Q. You can't understand now? Do you know Doc; do you know a man named Doc?

(Testimony of William Borda.)

A. Can't understand.

Q. Did you have an interpreter in this French Hotel that night? A. I don't understand you.

Q. Will you ask him if he had an interpreter in the French Hotel that night?

INTERPRETER.—No.

Q. Ask him if he told Mr. Brown where the proprietor was? A. Yes.

Q. Ask him if he told that to Mr. Brown in English?

A. He says he went up himself in the room, and show it to him, he can't understand.

Q. Ask him if he knows a man named Doc, who was in the place? A. Yes.

Q. Did Doc run away? A. No.

Q. What did Doc do? A. He was drinking.

Q. When Mr. Brown and the other officers came in what did Doc do? A. Nothing. [101]

Q. Did one of the officers run after Doc?

A. No.

Q. Did you see these glasses on the bar that night?

A. He says he don't know if them glasses, he says same kind of glasses.

Q. Did you see this bottle on the bar that night after the officers came in; that is marked Exhibit No. 3? A. No.

Q. Did you see this little bottle, exhibit No. 4, after the officers found it? A. No.

Q. Did you see them there at any time?

A. No.

(Testimony of William Borda.)

Q. Did you see these there on the bar at any time? A. No.

Q. Ask him if he worked for Mr. Bilboa on this night when the officers came in? A. Yes.

Mr. SPRINGMEYER.—That is all.

Mr. PATRICK.—That is all. I will call Mr. Patterson.

Testimony of E. O. Patterson, for Defendants.

Mr. E. O. PATTERSON, called as a witness by defendants, after being sworn, testified as follows:

Direct Examination by Mr. PATRICK.

Q. Your name is E. O. Patterson, and you are the Clerk of this Court? A. Yes, sir.

Q. As such Clerk did you have charge of the exhibits in a former suit? A. I did.

Q. Against these same parties? A. Yes, sir.

Q. I will ask you to examine this exhibit, and state whether that has been in your possession as Clerk since the former suit? (Hands to witness).

A. Yes, sir, ever since the former suit.

Q. I ask you to examine this exhibit, and ask if that has been in your possession since the former suit (hands to witness)? A. Never till to-day.

Mr. PATRICK.—That is all. [102]

Mr. SPRINGMEYER.—(Q.) Let me ask you if these glasses were in your custody as Clerk in the proceeding against these same defendants by the United States? A. No, sir.

Mr. SPRINGMEYER.—That is all.

Mr. PATRICK.—Defendants rest.

Mr. SPRINGMEYER.—We have no further evidence, may it please the Court.

The COURT.—Do you withdraw the motion heretofore made?

Mr. PATRICK.—No.

The COURT.—If you wish to insist on the motion, I will listen to you. The argument can be made in the presence of the jury or in their absence.

Mr. PATRICK.—Whatever is agreeable to the District Attorney.

Mr. SPRINGMEYER.—It is perfectly agreeable to me to let the jury hear everything we have to say.

Mr. PATRICK.—The effect of the motion was to exclude from the jury the small bottle introduced in evidence, on the ground that was introduced in evidence in another suit by the United States against these same parties, which was tried in June, upon an indictment, this present suit being on information; and at the conclusion of that trial the defendant Borda was acquitted. I therefore insist that the small bottle should not be admitted against the defendant Borda.

(Argument.)

The COURT.—As a matter of precaution, I shall exclude that particular bottle, as you ask; and the jury will be instructed as against the defendant Borda not to consider the testimony as to the small bottle or flask. That is the full extent of your motion, I think.

Mr. PATRICK.—Yes.

The COURT.—Proceed with the argument.
[103]

Charge of Court to Jury.

At the conclusion of the argument, the Court instructed the jury as follows:

The COURT.—I suppose it is useless, gentlemen, for me to say that you are bound to accept the law as it is given to you by the Court. This is a substantial and well-established rule of law; it is not because the judges want to assume any special authority; the law is fixed, and the purpose in the statutes, and in the procedure which prescribes this rule, is that the jury shall pass on the facts alone. You understood when you were examined before you were sworn, that you would follow the instructions of the Court, and it is your duty to do so. I may be mistaken in my interpretation of the law, and in my statement of what the law is, but that is no concern of yours. If I make a mistake, it is my mistake, and a mistake for which you are not responsible; it is a mistake which can be corrected in a higher court.

It will not do for any juror under his oath and in the performance of his duty to say I will not convict a man because he has a little liquor in his possession. When you say that you set yourself not only above the court, but above the law, and in violent antithesis to your oath. The law leaves it to you, however, to find out what the facts are; and the law is just as explicit and emphatic in saying that you are the ultimate judges as to what is proven by the facts as it is in saying that the judge

is to determine what the law is. I may tell you what I think is proven by this evidence; I may tell you what I think the evidence is, and I may give you my opinion of it; but if you follow that opinion against your judgment, again you are violating your oath. You can follow my opinion, and I have a right under the law to give my opinion if I desire, and think it proper and [104] expedient; but it has and can have no weight with you except as it appeals to your judgment, and to your conscientious judgment, in determining and weighing this testimony. It is for you to consider the evidence, and the manner of the witnesses on the stand; what they say is not only before you, but the manner in which they say it; and their motives, if any motives are disclosed. You cannot, however, go beyond the testimony which has been introduced here for your facts, any more than you can go beyond the instructions of the Court for the law.

There are three charges in this Information. The first is that the defendants together on the 20th day of March, 1922, at Gardnerville, had in their possession intoxicating liquors; the second is that the defendants on the same day sold intoxicating liquor; and the third is that on the same day and at the same place, these defendants maintained a nuisance; all of which is prohibited by the statute.

The statute as to the possession of intoxicating liquor is section 3, title II of the National Prohibition Act. That section in so far as it is pertinent, reads:

“No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act.”

No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, sell or possess any intoxicating liquor, except as authorized by this Act.

There is absolutely nothing in the Act which authorizes the possession of intoxicating liquor in a soft-drink parlor. [105] Whenever there is intoxicating liquor in a soft-drink parlor, there is a violation of the law. The Act is very broad in this, that it does not specify the amount of intoxicating liquor; it says the possession of any intoxicating liquor. There is nothing in the law which says that in order to violate this statute a man must have ten quarts, thirty quarts, or half a pint, or even one drink; it simply prohibits all.

Intoxicating liquor is defined in the statute. The definition is precise and admits of very little construction; it is easily applied and easily understood:

“When used in Title II and Title III of this Act, the word ‘liquor’ or the phrase ‘intoxicating liquor’ shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever

name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes.”

The language is plain; any liquor, even if you call it water or call it milk, if it contains one-half of one per centum or more of alcohol by volume, and is fit for use as a beverage, comes within the inhibition of this statute. You are not to be confused by the use of the term “fit” for use for beverage purposes. A beverage is something one drinks for the pleasure of drinking.

The statute I have read covers the first count of the Information, which charges the possession of intoxicating liquor; and it also covers the second count, which charges the selling of intoxicating liquor on the 20th day of March of the present year.

The third count charges the maintenance of a nuisance common nuisance; and that is defined in section 21 of the same Act, which I will also read:
[106]

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor.”

The maintenance of any place, house, room, boat, or structure where intoxicating liquor is kept for

sale in violation of the Prohibition Act, is a nuisance, and an offense.

Keeping for sale is something more than having intoxicating liquor in one's possession. It means keeping it for sale as a business. It is not necessary that the proof should show more than one sale, or show a dozen sales; it is simply necessary that under all the facts in evidence you are convinced that the place is a place where intoxicating liquor is kept for sale as a business.

The evidence in this case I think shows some things quite conclusively, but this is a matter for the jury to determine. The story told by the witnesses for the Government is largely contradicted and disputed by the witnesses for the defendants. The Government witnesses have testified—two of them—that they looked through the window into the soft-drink parlor, or the bar-room where this transaction is alleged to have occurred. They saw two men standing in front of the bar, on which there were three glasses, and in two of the glasses the witnesses state there was liquor. The witness Brown jumped on top of the bar after seizing these glasses, and in the struggle the liquid was spilled. His testimony and the testimony of Mr. Carter, and I think the testimony of Mr. DuBois also, is that the liquid [107] spilled by odor was wine and corn whiskey; they so pronounced it. They also testify that there was a bottle on the drain-board behind the bar, containing wine. There is testimony also to the bottle which was found in a rubber shoe; defendants deny any knowledge of that bottle.

The bottle found in the rubber is taken from your consideration. So far as Mr. Borda is concerned you are not to consider it in relation to the charge against him; it may be considered as against the other defendant Mr. Bilboa. It is evident from this that there was intoxicating liquor in the premises; if the testimony of the Government witnesses is true, a crime was committed by some one. The question then arises who committed the crime; and that is the question for you to determine from all the evidence in the case.

The possession must be conscious. No man can be convicted of having intoxicating liquor in his possession if he knows nothing about it, and was not conscious of its possession. In other words, if I slip a keg of beer or a barrel of whiskey into your house, you have not violated this law; true, you are in possession of the whiskey because it is in your house, but you are not guilty because it was not a conscious possession; you did not know it was there, and there was no intention on your part to have possession of the whiskey. But in determining whether these defendants were conscious of the possession of the liquor, you are to consider all the circumstances in the case, the testimony of the Government witnesses, and the testimony of the defendants that they knew nothing about it. That, I understand, is about the extent of their testimony, that they knew nothing of these bottles and never saw them; that they never sold any whiskey, and never had any in their premises.

In determining whether there was a nuisance

maintained, you will also consider all the circumstances; the bar-room, what you find occurred when the officers went in, whether the things were there which they saw, and the conduct [108] and actions of the various parties. As to the sale, a sale was completed if the man behind the bar gave to these men the whiskey or the wine, and they received it; the moment it was delivered to them and the money was on the bar therefore, the sale was completed, whether they drank the whiskey or wine, or not. Whether anything of that kind occurred is for you to determine after a comparison and consideration of all the evidence, *pro* and *con*, on that subject.

In determining the issues presented, you are to remember that the defendants are presumed, and each of them is presumed to be innocent until his guilt is proven beyond a reasonable doubt. This means just as has been explained by counsel, that the evidence in favor of the Government must not only weigh as much as the evidence to the contrary, but it must weigh more; and it must not only weigh more, but it must weigh enough to eliminate what is called a reasonable doubt. A reasonable doubt is best defined by the term itself; a reasonable doubt does not mean every doubt, but it means such a doubt as would control you in the more weighty affairs of life. If after a careful consideration of all this testimony you are satisfied to a moral certainty that the defendants or either of them is guilty, you are bound to so find. You are to remember that the presumption of innocence follows

the defendants throughout the entire consideration of this case, and throughout your deliberations. You can find them both guilty on all the counts; you can find one guilty and the other not guilty; you can find one guilty on one count and not guilty on another, just as the evidence appeals to and convinces your judgment. Is there anything further, gentlemen?

Mr. PATRICK.—No exceptions, your Honor.

Mr. SPRINGMEYER.—Nothing further, may it please the Court.

The jury retires at 3:55 P. M. to consider their verdict and at 7:35 P. M. returned into court with the following verdicts: [109]

“In the District Court of the United States for the
District of Nevada.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

We, the jury in the above-entitled case, find the defendant, Wm. Borda, not guilty as charged in the first count of the information, guilty as charged in the second count; and not guilty as charged in the third count.

Dated this 15th day of August, 1922.

GEO. W. WILSON,

Foreman.”

“In the District Court of the United States for the
District of Nevada.

No. 5610.

THE UNITED STATES

vs.

J. BILBOA and WM. BORDA.

We, the jury in the above-entitled case, find the defendant J. Bilboa, guilty as charged in the first count of the Information; guilty as charged in the second count; and not guilty as charged in the third count.

Dated this 15th day of August, 1922.

GEO. W. WILSON,

Foreman.”

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO
HEREBY CERTIFY:

That as such reporter I took verbatim shorthand notes of the testimony and proceedings in said court on the trial of the case of United States of America, Plaintiff, vs. J. Bilboa and Wm. Borda, Defendants, on August 14th and 15th, 1922, and that the foregoing transcript, consisting of pages 1 to 69, both inclusive, contains a full, true and correct transcription of my [110] shorthand notes of the testimony given and proceedings had on said trial.

Dated Carson City, Nevada, September, 20th,
1922.

A. F. TORREYSON.

BE IT FURTHER KNOWN, that thereupon said defendants were sentenced and judgment was passed and rendered in accordance with the aforesaid verdict of the jury, and that thereupon said defendants and each of them, made a motion for a new trial and for a vacation of the judgment, which motion was overruled and denied, said defendants severally excepted to the order of the Court overruling and denying said motion, and the defendants' exceptions were duly allowed.

That said motion for a new trial and vacation of judgment was made upon the following grounds:

I.

That the Court erred in its decisions upon questions of law arising during the course of the trial.

II.

That the Court misdirected the jury in matters of law and fact.

III.

That the verdict of the jury is contrary to the law.

IV.

That the verdict of the jury is contrary to the evidence.

V.

That said verdict as to each and all of said defendants is not supported by the evidence. [111]

In the District Court of the United States, in and
for the District of Nevada.

No. 5610.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WM. BORDA,

Defendants.

Certificate of Attorneys to Bill of Exceptions.

We, the undersigned attorneys for the respective parties in the above-entitled action, do hereby certify that the foregoing bill of exceptions is full, true and correct, and that we approve of same and that the same may be presented to the Honorable E. S. Farrington for settlement and allowance.

Dated this 20th day of November, 1922.

O. G. KUKLINSKI,

HUSKEY & KUKLINSKI,

Attorneys for Defendants,

GEORGE SPRINGMEYER,

U. S. Attorney. [112]

In the District Court of the United States, in and
for the District of Nevada.

No. 5610.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. BILBOA and WM. BORDA,
Defendants.

Certificate of Judge to Bill of Exceptions.

The foregoing was prepared and submitted to me as a bill of exceptions by the defendant November 20, 1922, and I do now, in pursuance of the foregoing stipulation of George Springmeyer, U. S. Attorney for the District of Nevada, certify that it is full, true and correct, and has been settled and allowed and is made a part of the record in this cause.

Done in open court this 20th day of November, 1922.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and Wm. Borda, Defendants. Bill of Exceptions. Filed Nov. 20, 1922. E. O. Patterson, Clerk. Huskey & Kuklinski, Attorneys at Law, Reno, Nevada.
[113]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants, said case being No. 5610 on the docket of said court.

I further certify that the attached transcript, consisting of 121 typewritten pages numbered from 1 to 120, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the city of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$54.80, has been paid to me by Messrs. Huskey & Kuklinski, attorneys for the defendants.

And I further certify that the original writ of error, and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court, this 2d day of December, A. D. 1922.

[Seal]

E. O. PATTERSON,

Clerk, U. S. District Court, District of Nevada.

[114]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Citation on Writ of Error (Original).

The United States of America,—ss.

The President of the United States to the United
States of America, GREETING: To the
United States of America:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within 30 days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the clerk's office of said court on the 28th day of August, A. D. 1922, in a cause wherein J. Bilboa

and William Borda are appellants and you are appellee, to show cause, if any, why the judgment and decree rendered against the said appellants as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 28th day of August, A. D. 1922, and of the Independence of the United States the one hundred and forty-seventh.

E. S. FARRINGTON,
District Judge. [115]

[Seal]

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 29th day of August, A. D. 1922.

GEORGE SPRINGMEYER,
U. S. Attorney, District of Nevada. [116]

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Citation on Writ of Error (Original). Filed Aug. 28th, 1922. E. O. Patterson, Clerk. [117]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. BILBOA and WILLIAM BORDA,

Defendants.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, wherein the United States is plaintiff and J. Bilboa and William Borda are defendants, a manifest error hath happened, to the great damage of the said J. Bilboa and William Borda, the defendants, as by the indictment in said cause and the record of proceedings therein appear. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals

for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the said United States Circuit Court of Appeals at San Francisco, California, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to [118] the laws and customs of the United States should be done.

WITNESS the Honorable E. S. FARRINGTON, Judge of the said United States District Court of the District of Nevada, the 28th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal]

E. O. PATTERSON,

Clerk of the United States District Court for the District of Nevada.

Allowed by:

_____. [119]

[Endorsed]: No. 5610. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Bilboa and William Borda, Defendants. Writ of Error (Original). Filed Aug. 28, 1922. E. O. Patterson, Clerk.

[Endorsed]: No. 3947. United States Circuit Court of Appeals for the Ninth Circuit. J. Bilboa and William Borda, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Received December 4, 1922.

F. D. MONCKTON,
Clerk.

Filed December 6, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3947

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiffs in Error

**Upon Writ of Error to the United States District
Court of the District of Nevada.**

Huskey & Kuklinski,
Attorneys at Law.
Byington Bldg., Reno, Nevada.

FILED
JAN 25 1923
F. D. MONCKTON,
CLERK

No. 3947

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,	}
Plaintiffs in Error,	
vs.	
THE UNITED STATES OF AMERICA,	
Defendant in Error.	}

Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court of the District of Nevada.

STATEMENT OF CASE.

On the 26th day of June, 1922 the United States Attorney for the District of Nevada filed an information against J. Bilboa and William Borda charging them jointly with the violation of the National Prohibition Act in three counts; to wit:

First: That on March 20, 1920 they did unlaw-

fully, wilfully and knowingly have in their possession intoxicating liquor.

Second: That they did unlawfully, wilfully and knowingly sell intoxicating liquor.

Third: That they did unlawfully, wilfully and knowingly maintain a common nuisance, by keeping intoxicating liquor for sale in the French Hotel at Gardnerville, Nevada.

Plaintiffs in Error concede the sufficiency of the information on each count.

The offenses charged were alleged to have been committed at Gardnerville, Nevada on March 20, 1922 at the French Hotel. The French Hotel as developed in the evidence was owned by J. Bilboa. It contained a soft drink parlor and bar room, and also furnished meals and rooms. The defendant William Borda was employed by J. Bilboa at the time of the alleged offense, as bartender. Shortly after midnight on March 20, 1922 three prohibition officers, H. P. Brown, A. Carter and P. Dubois entered the French Hotel, one of them H. P. Brown jumped over the bar, seized defendant William Borda and by this impetuous movement spilled the liquids contained in the glasses on the bar. Witness A. Carter and H. P. Brown testify that before the entry of the three into the establishment they, Carter and Brown looked through the window and saw two men in front of the bar, two glasses on the bar filled with some liquid, and saw defendant William Borda behind the bar and directly in front of the two men on the other side of the bar. Brown states that the men were

drinking, Carter states they were about to drink. Both agree that the contents of the glasses which had stood on the bar were spilled. There is no testimony that any dregs even remained in the glasses. They testified that from the odor in the glasses they supposed one glass contained wine, another corn whiskey. They also testified that from the appearance they saw a reddish looking liquid in one of the glasses and a pale dark brown liquid in the other. To be more **specific witness A.** Carter states that when he looked through the window he saw two men standing at the bar, about **ready to take a drink.** Transcript of Record—Page 68.

Witness Brown testifies **that from the window he** saw some money on the bar, a piece of silver. Transcript of Record—Page 95.

Witness A. Carter testifies that after he entered he also saw a piece of money on the bar, but could not tell the denomination, or what became of it.

All three witnesses agree that the liquids spilled were spilled by their precipitous action and that the defendant William Borda made no attempt whatsoever to spill the liquids contained in the glasses, to resist the officers or to destroy the evidence.

Witness Brown testifies that the glasses had an alcoholic smell. Witness Dubois testifies that from the odor one glass appeared to have had wine in it and the other seemed to be whiskey and witness Carter testifies that he determined that there had been red wine and corn whiskey in the glasses looking at them and smelling of them.

The officers then discovered a bottle of wine about one quarter full on the drain board behind the bar and a small half pint flask of corn whiskey one quarter full in an overshoe on the end of the bar. There were three or four pairs of overshoes at the end of the bar and besides the two men alleged to have been drinking or about to drink another man was sitting close to the stove at the end of the bar in the vicinity of the three or four pairs of overshoes.

Defendant J. Bilboa, proprietor, was upstairs in bed where he had retired about eleven o'clock that evening, until ordered to come down by witness Brown. Both defendants acknowledged their mutual relationship, namely that defendant Bilboa was the proprietor and that defendant Borda worked for the proprietor. Both **disclaimed absolutely all knowledge** of the bottle of wine and the half pint flask of whiskey. Defendant Borda testifies that he did not serve either wine or corn whiskey or any intoxicating liquor to the customers but that he did serve **O. T. and grape juice**. Both defendants testify they never sold or kept any intoxicating liquors. There is no dispute as to the contents in the bottle found on the drain board nor as to the contents of the half pint flask found in the overshoe.

The Court admitted the half pint flask of whiskey in evidence but specifically instructed the Jury that they could not regard or take into consideration the half pint flask of whiskey so far as defendant Borda was concerned but that it could be considered against defendant Bilboa. Prior to the introduc-

tion of evidence defendants moved for separate trials, which motion was denied by the Court.

The Jury found defendant William Borda guilty of sale, convicted defendant J. Bilboa of possession and sale, and found both defendants not guilty of maintaining a nuisance by keeping liquor for sale.

SPECIFICATIONS OF ERRORS.

The first assignment of Error made is that there is no evidence to support the verdict; that there is no evidence to show guilty knowledge of the defendants as to the alleged liquor found on certain premises.

Second: That the Court ignored the element of knowledge in its instructions.

Third: That the verdict of the Jury is contrary to the evidence.

Fourth: That the verdict of the Jury is contrary to the Law. At the outset of the case a motion for a separate trial of the defendants was denied by the Court.

ARGUMENT.

We respectfully contend that the entire evidence submitted was insufficient to sustain the conviction of these defendants or either of them on any charge. One factor must be borne in mind particularly as to the defendant Borda the bartender, that the half pint of whiskey was excluded from the consideration of the Jury. That as far as defendant Borda is concerned, only evidence relating to the empty glasses and the bottle of wine on the drain board is

to be considered. Defendant Bilboa if responsible at all for any alleged sale that took place is responsible on the theory of express or implied authority granted by him to Borda to sell intoxicating liquors. The rule of Agency in criminal cases has been very recently stated in the case of *Nobile vs U. S.* 284 Fed. 253—Page 255:

“Criminal liability of a person or master for the action of his agent or servant does not extend so far as the civil liability. He cannot be held criminally for the acts of his agent, contrary to his order, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent’s employment, though he might be liable civilly.”

Commonwealth vs Stephens 155 Mass. 291, 295.

The evidence in the above case showed that defendant Nobile, the proprietor, actually saw the bartender sell intoxicating liquors, and sent over for liquor to be sold.

No evidence whatsoever appears in the case against defendant Bilboa that he knew anything at all about the **alleged acts of defendant Borda**. There is no dispute that he was in bed and the only link connecting Mr. Bilboa with the sale is the fact that he admitted that Borda was working for him.

In the case of *McWhorter vs U. S.*, 281 Fed. 119 on Page 21, it was specifically held that in a prosecution for crime, the agency of a person whose acts and declarations are offered in evidence against the accused cannot be established by proof of acts and

declarations of the alleged agent, in the absence of proof that accused had knowledge of such acts and declarations and either acquiesced or assented thereto.

“In a criminal case where no conspiracy has been proven mere suspicion even though that suspicion is based upon the association of the accused with the alleged agent is not sufficient to establish the fact of agency. On the contrary before the declarations of a third person are admitted in evidence against the defendant there must be definite and substantial evidence **direct** or circumstantial to prove the authority of the agent.”

And

“Nor does the evidence on the part of the Government tend to show that the acts and declarations of Lawson were all so connected and continued for such a length of time as to justify the inference that the defendant knew and acquiesced therein.”

Citing Sievert vs Furniture Company 178 Ill. App. 524.

There is therefore lacking in the Government's case any attempt even to show any knowledge or acquiescence on the part of the defendant Bilboa as to the alleged sale by his servant Borda. No connection outside of the fact that he was the proprietor of the place is shown. The necessary authority either express or implied from Bilboa as to this alleged sale must be proven substantially either by direct evidence or by circumstances sufficient to warrant the inference of authority.

There is no substantial evidence as to the contents of the empty glasses found on the bar. It is certain and obvious that the color alone of the liquor contained in the glasses could not prove beyond a reasonable doubt what the glasses had contained. The attempt to prove what they had contained by the alleged odor of the glasses is indeed a strained one. It is to be noted that witness Brown testified that the odor was an alcoholic one. We submit that even if this were true, it necessarily would not prove that the liquids contained were intoxicating liquors containing more than one-half of one per cent alcohol. The grape juice or the O. T. could have had an alcoholic odor. Witness Carter testified that the glasses smelled of red wine and corn whiskey.

The attempt of the United States Attorney to qualify the officers as experts in order to secure their opinion as to what the glasses had contained did not show that the officers had smelled either red wine or corn whiskey on any other occasion. The testimony we contend as to what the contents of the glasses were is entirely opinion testimony and only a conclusion on the part of the officers.

Certainly the Government did not exclude the hypothesis of innocence.

There was no attempt made upon the part of the Government to connect what the contents of the glasses was supposed to have been with the unlawful liquor found on the premises. No attempt to prove that grape juice or O. T. was not on the premises. No attempt to show that it was not customary to

serve O. T. in a small whiskey glass with a "chaser", same being a hot peppery gingerlike beverage and so served.

That Borda was behind the bar was not an incriminating circumstance. That customers were in front of the bar was not a fact from which guilt could be presumed. In fact, under the presumption of innocence, it is to be presumed that these men had ordered soft drinks, the only drinks a soft drink establishment is lawfully presumed to have. Because of the total failure of the prosecution to connect up the alleged unlawful liquor found on the premises with that alleged to have been sold, there is no substantial evidence of a sale of unlawful liquors. There is nothing to preponderate over the presumption of innocence. The hypotheses of innocence are not excluded at all.

In all the cases examined by us as to the sufficiency of the evidence to sustain a verdict of guilty, we have found none as weak as the case at bar. To prove what the contents of the glasses had been no attempt was made by the Government to prove what the purchasers upon entering the place, inquired about or asked for, as in *Lewinsohn vs U. S.* 278 Fed. 421 and again as in *Strada vs U. S.* 281 Fed. 143—Page 145. In *Cabiale vs U. S.* 276 Fed. 771 agents were on the premises as waiters. In *Herrine vs U. S.* 276 Fed. 806 defendants admitted to officers the sale of unlawful liquors. In *Kathriner vs U. S.* 276 Fed. 808 defendant made an admission as to the sale. In all of these cases the Government submitted testimony

to exclude any hypothesis of innocence.

No other evidence except that of the half pint flask of whiskey and the bottle about one quarter full of wine was introduced. The Jury specifically acquitted the defendants of the charge of maintaining a nuisance by keeping liquor for sale in the building. In *Williams vs U. S.* 282 Fed. 483 the Court says:

“The effect of the Finding of the Jury that the plaintiff in Error was guilty under the second count of the indictment * * * * was in effect an acquittal of the other two offenses charged under that indictment.”

If the defendants were not guilty of keeping any liquor for sale in the premises the inference is that they had not sold any unlawful liquors even though unlawful liquor was found there. In the case of *Millich vs U. S.* 282 Fed. 605 this Court commented upon the fact where the defendants had been acquitted of the sale charge, yet found guilty on the possession charge, that that was entirely possible that though the defendant did not sell the liquor yet they had it in their possession.

In the case at bar we respectfully submit that the Jury found that the defendants had not kept any unlawful liquor on the premises for sale. This fact must be taken as true as well as the necessary inference therefrom and even if the defendants were found guilty of the charge of possession there is no basis for a verdict of guilty on the charge of sale.

There is but one transaction involved in this action and with the slight evidence before it the Jury speculated as to the probable guilt of the defendants. The half pint of whiskey was found in an overshoe at the end of the bar where there were various other rubbers or overshoes. Defendant Bilboa the only one concerned as far as this half pint flask is concerned, testified that the rubber was not his. No attempt was made by the Government to prove that the rubber was Bilboa's or Borda's. No attempt was made to rebut the presumption of innocence or to exclude any hypothesis but that of guilt. Under the circumstances we feel that the entire record is persuasive of a miscarriage of Justice. That the case under no circumstances should have been submitted to the jury by the Court that there was no substantial evidence introduced to outweigh the presumption of innocence and further presumption that no one can presume that men will do wrong. As stated in the late case of *Nosowitz vs U. S.* 282 Fed. 575—Page 578:

“Upon this testimony the Jury were permitted to speculate as to intended violation of the statutes on the part of the plaintiff in Error.”

AND AGAIN

“Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial charge to instruct the Jury to return a verdict for the accused, and where the substantial evidence is as consistent

with innocence as with guilt, it is the duty of this Court to reverse a judgment against the plaintiff."

Citing among other cases *Isbell vs U. S.* 227 Fed. 778.

AND AGAIN in *Wiener vs U. S.* 282 Fed. 799—
Page 801.

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial Court to instruct the Jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

Citing *Union Pacific Coal Company vs U. S.* 173 Fed. 737-740 and *Wright vs U. S.* 227 Fed. 855-857.

Defendants both testified that they had no knowledge that any intoxicating liquor was on the premises. The burden of proof as to how the liquor came on the premises we submit under the construction placed upon the National Prohibition Act in the case of *Cleveland vs U. S.* 281 Fed. 250 was not upon the defendants. Section 33 of the National Prohibition Act applies only to civil actions concerning the possession of intoxicating liquors. No evidence on the part of the Government was introduced to rebut the presumption of innocence and no evidence was introduced by the Government to exclude the hypothesis of innocence.

All the circumstances shown by the Government

are consistent with innocence, and by a great preponderance. In regard to the sale, which the Government contends was a sale of unlawful liquor, the testimony was entirely opinion testimony. The officers did neither taste nor smell what was spilled on the bar. They took no precaution to secure the best evidence, did not subpoena the purchasers. The Jury speculated on the slim testimony submitted to it. Finding Borda guilty of sale only and Bilboa guilty of sale and possession yet acquitting both of the charge of maintaining a nuisance by keeping liquor for sale in the building can only be explained by the lack of testimony to prove any charge beyond a reasonable doubt. Bilboa could only have been held and convicted of sale on the same theory on which he was charged as codefendant with Borda, namely, that this was a common undertaking, agreed to by both defendants. No evidence whatsoever is introduced as to such undertaking or agreement either express or implied, either directly or by circumstances substantially proving the same. No substantial evidence appearing to the contrary we submit the defendants both are entitled to the benefit of the substantial and reasonable doubt caused by the officers' own precipitancy as relates to the alleged sale. Defendant Bilboa is convicted only by the unreasonable and unjust inferences drawn from the entirely lawful circumstance that he was the proprietor of the place. We earnestly contend that had the Court even submitted the case on proper instructions as to burden of proof, as to knowledge, as to opinion

evidence and as to criminal responsibility of master and servant charged as codefendants, an acquittal would have followed. As it was, defendants were entitled to have the verdict set aside. All these matters were matters vital to the defendants' cause. Lack of sufficient evidence of the Government and proper instructions of the Court as manifested by the record resulted in a miscarriage of Justice. If the defendants are guilty they should be proven so by substantial evidence. In the case of *Chicco vs U. S.* 284 Fed. 435 on Page 438 the Court in a case very similar to the one at bar expresses its views as follows:

“Indeed we may go further and say that we think there was no **real substantive** evidence on which the case of *Chicco* should properly have been submitted to the Jury or if submitted to the Jury on proper instructions as to the burden of proof imposed upon the Government in criminal cases, and the presumption of innocence in the accused, no other result could or ought to have followed than a verdict of acquittal. We feel therefore constrained to conclude that the motion for a directed verdict as to *Chicco* should have been granted or that in any event, on the verdict as returned, the Court should of its own motion have set it aside and granted a new trial.”

We therefore respectfully submit that the defendants are entitled to a reversal and new trial.

Respectfully submitted,

HUSKEY & KUKLINSKI,

Attorneys for Plaintiffs in Error.

No. 3947

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

JANUARY TERM, 1923

J. BILBOA and WILLIAM BORDA, Plaintiffs in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error.	}
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Brief of Defendant In Error

GEORGE SPRINGMEYER,
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CHAS. A. CANTWELL,
Assistant United States Attorney.

Attorneys for Defendant in Error.

No. 3947

IN THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

J. BILBOA and WILLIAM BORDA,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

As nearly as may be, defendant in error will follow the plan of the brief of plaintiffs in error.

I.

Plaintiffs in error argue first that the "entire evidence submitted was insufficient to sustain the conviction of these defendants or

either of them on any charge.”

There was no motion by plaintiffs in error for a directed verdict. There were no objections, and no exceptions. Hence, if there is any evidence at all upon which the verdict can be sustained, this Court will not review the sufficiency of the evidence. See:

Williams vs. U. S. 282 Federal 481, 483.

Nosowitz vs. U. S. 282 Federal 575.

There is ample evidence in the record to sustain the verdicts against both defendants. To summarize a part of the evidence: Three officers testified that when they entered the soft-drink establishment where defendants were arrested about midnight, defendant Borda was behind the bar serving two men who were at the bar about to take a drink from filled glasses in their hands. They had placed money on the bar. As the officers rushed in, the liquor was spilled on the bar, one of the men drinking ran away, and the officers said that judging from appearance and smell the liquor in one glass,—an ordinary wine glass,—was red wine, in another glass,—a whiskey glass,—was corn-whiskey, and that a “chaser” of water was in a third glass. On the drain-board back of the bar was a wine bottle partly filled with wine, which analyzed 16.52 per cent. alcohol, and in a rubber shoe back of the bar was a flask of corn whisky containing an alcoholic content 42.12 per cent. Defendant Borda when arrested said he was the bartend-

er, and that the proprietor, defendant Bilboa, had gone upstairs to bed at eleven o'clock. Defendant Borda immediately took one of the officers to defendant Bilboa's room. Defendant Bilboa dressed, went downstairs to the bar-room, admitted he was the proprietor and employer of defendant Borda, bartender, and when charged with the crime did not deny knowledge of the acts of defendant Borda, nor of the presence of the intoxicants in his premises. On the witness stand, both defendants again admitted that defendant Bilboa had been in the bar-room until about eleven o'clock, that he then went to bed upstairs, that he was proprietor and employer of defendant Borda, bartender, and that when charged with the crime he did not deny knowledge of the acts of defendant Borda, nor of the presence of the intoxicants in his premises. Defendant Bilboa said his bar-room was open daily from six o'clock mornings until one o'clock next mornings. See transcript pp. 68, 69, 70, 72, 74, 77, 78, 91, 95, 96, 99, 102, 106, 116, 117, 119, 120, 121, 122, 123, 124, 126, 127, and 128.

It is believed, therefore, that there is an abundance of evidence to warrant the conviction of the defendant Borda on the sale count, and of the defendant Bilboa on both possession and sale counts.

II.

Plaintiffs in error suggest that defendant

Bilboa can be held responsible for the sale by his bartender, defendant Borda, only on the theory of express or implied authority to the latter, who did the selling.

But Section 332 of the Federal Criminal Code makes anyone a principal who aids, abets, counsels, commands, induces or procures the commission of a crime. The section reads:

“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal.”

Certainly, the defendant Bilboa aided and abetted the offense, for he admitted ownership of the premises and of the wine and whiskey glasses, employment of defendant Borda, who sold the intoxicants, keeping the place open from six o'clock mornings until one o'clock next mornings, and being present in the bar-room until eleven o'clock on the night of the raid.

It is believed further, that even on the doctrine of express or implied authority to an agent, eliminating Section 332 F.C.C. from consideration, the facts sustain the verdict against defendant Bilboa. Plaintiffs cite *Nobile vs. U.S.* 284 Fed. 253 as an authority, and they quote from it at length, but they omit to quote the instruction approved by the Cir-

cuit Court as a "correct exposition of the law". That instruction reads:

"So and so has sold this hat, this coat, this suit. Of course in the case of a man doing an illegal business, you must be satisfied that it is his business which is being conducted by another, because there is no presumption that an agent is carrying along the illegal business of his employer; but, if the evidence shows that the employer is carrying on the illegal business, it is not necessary that he be actually there every hour of the day selling stuff, if it is his business and you are satisfied beyond a reasonable doubt that it is being carried on by him through another, just as in the case of a lawful business."

See also:

Albert vs. U. S. 281 F. 511, 513.

Wiggins vs. U. S. 272 F. 41, 45.

This Court held in the case of Young vs. United States, 272 Fed. 967 that under facts almost exactly the same as in the instant case, both the proprietor and bar-tender were properly found guilty on a nuisance count.

Plaintiffs in error cite McWhorter vs. U. S. 281 Fed. 119, as authority for the proposition that declarations of third persons cannot be introduced in evidence against the defendant. But plaintiff in error Bilboa made no objec-

tion at the trial to the introduction of plaintiff in error Borda's statement that Bilboa was proprietor and employer, and Borda the bar-keeper. The McWhorter case is not disputed; on the contrary, it is cited as an authority for the admission in evidence, without objection or exception, of the statements made by both plaintiffs in error, as a part of the *res gestae*. The Court in the McWhorter case said:

“In the trial of a criminal case, acts and declarations of a third party at the time of the commission of an offense charged, or substantially coincident therewith, may be introduced in evidence as part of the *res gestae*, upon the theory that acts and words so closely connected with the main fact as to really constitute a part thereof, are necessary to a proper understanding of the main transaction.”

The fact of agency may be established by circumstantial evidence. The summary of evidence given at the beginning of this brief shows an abundance of such circumstances, and in addition the admissions of the defendant Bilboa. See:

“Circumstantial evidence is ordinarily competent to establish the fact or extent of an agency. Where such evidence is resorted to for the purpose of establishing agency, all the facts and circumstances showing the relation of the parties, and their treatment of each other, and throw-

ing light upon the character of such relation, are admissible in evidence.”

Turner et al vs. Yates, 57 U. S. 14, L. Ed. 484.

“The defendant made statements to other officers admitting ownership of the liquors and his desire to keep the liquors which had been seized. The admissions of the defendant, made voluntarily, and not impeached as having been made involuntarily, are strong evidence of the truth of what they purport to say.”

Wiggins vs. U. S., 272 Fed. 41, 43.

Accordingly, it is respectfully suggested that the theory, in effect, that plaintiff in error Bilboa should not have been convicted of the sale count because he was not caught in the act of selling, is unsound.

III.

Plaintiffs in error assert there is no substantial evidence as to the contents of the glasses, which the men drinking at the bar had in their hands as the officers raided the premises. The officers, all qualified as experts, testified that red wine was in one glass; it looked and smelled like wine; that corn-whiskey was in another glass; it looked like corn-whiskey and smelled alcoholic. Wine and corn-whiskey which on analyses showed high

alcoholic content were on the drain board back of the bar. One of the men ran away. Is not that substantial evidence?

This Court does not require argument addressed to the point that an analysis for alcoholic content is not necessary. See:

Strada vs. U. S. 281 Fed. 143.

Albert vs. U. S. 281 Fed. 511, 513.

Rose vs. U. S. 274 Fed. 245, 247.

Singer vs. U. S. 278 Fed. 415, 418.

Lewisohn v. U. S. 278 Fed. 421, 425.

IV.

Plaintiffs in error argue that their acquittal on the nuisance count makes improper their conviction on the sale count. But there is no inconsistency in such verdicts. A nuisance contains elements in addition to the mere possessing, or the mere selling, or both. For instance, a man might be found guilty of possessing or selling in the lobby of a hotel which is owned and conducted by someone else; as he does not own or conduct the lobby, he cannot be held for maintaining a nuisance there. So in the instant case the jury might have found that the defendants did not conduct a nuisance at the place, even though liquor was sold there; a single sale may or may not constitute a nuisance.

Wherever a count on which there has been

an acquittal contains an additional or different necessary ingredient to constitute the offense than the ingredients of the count on which there has been conviction, there is no inconsistency. Thus, in *Lowenthal vs. United States*, 274 Fed. 563, a verdict of not guilty on a count for unlawfully purchasing narcotics was not inconsistent with a verdict of guilty on a sale count. The situation in the instant case is very nearly the same. The same principle is involved as in the case of *Millich vs. U. S.* 282 Fed. 605, cited by plaintiff in error. *Williams vs. United States*, 282 Fed. 481, 483, a Mann Act case, cited by plaintiffs in error, is readily distinguishable. Said the Court:

“However strong the testimony may tend to establish the alleged acts of immorality*****it utterly fails to establish against Williams the offense of persuading, inducing, enticing and coercing Maude McAbee to make the trip in interstate commerce*****”

See also: *Baldini vs. U. S.* decided in this court January 22, 1923.

Com. vs. Lowry (Mass) 34 N. E. 81.

Plaintiffs in error cite *Nosowitz vs. United States*, 282 Fed. 575, *Isbell vs. United States* Fed. 778 and *Wierner vs. United States*, 282 Fed. in support of the proposition that the evidence does not warrant conviction of the plaintiffs in error.

The argument is merely a continuation of the beginning of the brief of plaintiffs in error, our reply to which, in substance, was that there was ample evidence in the record to support conviction, that there had been no objections, no exceptions, and no motions for a directed verdict. The argument of plaintiffs in error goes to the weight of evidence and was for the trial jury; it has no place in this Court. For, it is the rule of law that "This court has no power to determine the weight of the evidence". (Rose vs. United States, 274 Fed. 245 at 247.) See Waddell vs. U. S. 283 Fed. 409. And Section 1011 Revised Statutes of the United States expressly provides:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error*****for any error in fact."

The language of the dissenting judge in Chicco vs. United States, 284 Fed. 434 at 438,—a case which differs from the instant case in that in it there was a motion for a directed verdict,—is appropriate here:

"Appellate courts should exercise great caution in setting aside convictions for lack of evidence. The drama of the trial cannot be re-enacted in the appellate court. Evidence which appears light here may have been made truly weighty by its setting. The manner of the defendant and his witnesses, their silence or their

denials in connection with other circumstances, may be as convincing as positive testimony."

It is urged that for the reasons stated the judgment should be affirmed.

Respectfully submitted,

GEORGE SPRINGMEYER,
United States Attorney.

CHAS. A. CANTWELL,
Assistant United States Attorney.

Attorneys for Defendant in Error.

Dated: Reno, Nevada, January 31, 1923.

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,	}
Plaintiffs in Error,	
vs.	
THE UNITED STATES OF AMERICA,	
Defendant in Error.	}

Petition for Rehearing

Upon Writ of Error to the United States District
Court of the District of Nevada.

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FILED
U.S. DISTRICT COURT
D. DISTRICT OF NEVADA
JULY 10 1915

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,	}
Plaintiffs in Error,	
vs.	
THE UNITED STATES OF AMERICA,	
Defendant in Error.	}

PETITION FOR REHEARING.

Upon Writ of Error to the United States District
Court of the District of Nevada.

This Honorable Court on February 26th, 1923, affirmed the judgment and verdict rendered in the District Court against each of the plaintiffs in error. We believe that there is a misapprehension of fact in regard to the state of the record in this case, in the mind of the Court.

In the case at bar not only was a motion for a new trial made in the case, but also a motion to vacate judgment was made. (Pages 25, 26 & 27 Transcript of Record. Both of these motions were

denied. Both motions included the ground, that the evidence was insufficient to support the verdict. This objection was called directly to the attention of the trial court and it is therefore that counsel for plaintiffs in error respectfully submit that the cases *Finley vs U. S.* 256 Fed. 845; *Central R. Co. of N. J. vs Sharkey*; *Robinson vs Belt* 187 U. S. 41; are inapplicable. The latter two cases are civil cases. In criminal cases, where the liberty and freedom of citizens are involved, this Honorable Court has in various instances considered substantial errors even of its own motion, manifestly to prevent a judicial wrong.

We earnestly and respectfully submit that in this case, innocent men are convicted of a crime where the evidence even viewed most unfavorably tends only to cast suspicion on them. The fundamental principle of the law, that a man is presumed innocent until proven guilty by substantial evidence is violated by the judgment and verdict. The rule that where the evidence does not exclude the hypothesis of innocence and where the evidence is consistent with innocence that in such instances the evidence is insufficient to convict is absolutely disregarded. A vital right of defendants is infringed upon, producing such a miscarriage of justice which we respectfully submit would justify this Honorable Court in considering and reviewing the record of its own motion.

In our brief and assignments of error we endeavor to present to this Honorable Court that the evidence adduced in this case was insufficient particularly because the element of guilty knowledge was not proven; that in fact this necessary element

of every crime was absolutely disregarded and no evidence whatsoever was introduced from which guilty knowledge could be rightly inferred. We respectfully submit that even before the amendment of Sec. 69 of the Federal Code, the Supreme Court of the United States in *Wiborg vs U. S.* 163 U. S. 632 and particularly in *Clyatt vs U. S.* 197 U. S. 207, noticed and examined the record where such a plain error was called to its attention.

“No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.”

Clyatt vs U. S. 197 U. S. 207-222.

With the amendment of Sec. 269 Federal Code this spirit of the Supreme Court was endorsed and approved by Congress.

The necessary elements of the crimes in the case at bar are not proven, and further no evidence was introduced which would justify a jury in finding those elements. Every bit of evidence was consistent with innocence.

We agree with this Honorable Court that where defendants are indicted on three counts, “It was the duty of the jury to return a verdict upon each count”. The last sentence of the decision, namely “and the fact that it found the defendants not guilty on one count is not conclusive as to their guilt on

the others," is not clear to us. All we contended in our brief and oral argument as to the inconsistency of verdicts was that we would have to consider the necessary inference which followed from a verdict of guilty on the nuisance count. That it is presumed the jury considered only evidence submitted to them. That where there was only one instance of misconduct offered in evidence as in the case at bar and where one count was necessarily included in the other count, namely sale and maintaining a nuisance by keeping liquor for sale, that in such a case there was *prima facie* serious doubt as to the sufficiency of the evidence to convict on any count. This particular fact is urged by us as the more reason for the scrutiny and examination of all the evidence in the case.

The sentence "It was the duty of the jury to return a verdict upon each count of the indictment and the fact that it found the defendants not guilty on one count is not conclusive as to their guilt on the others," in our mind seems to be drawn a little hastily or cursorily or is not an accurate transcription of the opinion of this Honorable Court.

We earnestly submit that considering the important precedent established by this decision and in view of the fact that a motion for new trial and a motion to vacate judgment was denied by the trial court and in view that error was assigned in said motions and on this writ of error that the evidence was insufficient to support the verdict and particularly that the necessary elements of the alleged crimes were not proven and that no evidence was introduced to justify the finding of such crime by the jury, that this error is of such vital importance

to plaintiffs in error as to warrant the examination of the record by this Honorable Court to see that no miscarriage of justice was perpetrated.

Respectfully submitted,

HUSKEY & KUKLINSKI,
Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Appellants,

vs.

ALBERT R. McPHEE and FRANCES McPHEE,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED

JAN 15 1923

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
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In the District Court of the United States, in and
for the Western District of Washington, North-
ern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
and BELLINGHAM BAY IMPROVE-
MENT CO., Corporations,
Defendants.

Second Amended Complaint.

Plaintiffs bring this their second amended com-
plaint, leave of the Court being had, and complain-
ing of the defendants allege:

1.

At all times hereafter set forth plaintiffs were
and are husband and wife, and defendants are cor-
porations, doing business in the county of Whatcom
aforesaid, and the property rights hereafter men-
tioned belong to the community estate of plaintiffs,
and the things hereafter mentioned as done by
plaintiffs were done by Albert R. McPhee for such
community estate.

2.

Plaintiffs are the equitable owners, and in the
possession of the following described lands, to wit:

The west half of the northwest quarter, and the
northwest quarter of the southwest quarter of Sec-
tion 12, in Township 39 North, Range 6 East, in
Whatcom County, Washington.

3.

Plaintiffs deraign their right to the legal title of said land because of this: In the year 1901 said lands were a part of the unsurveyed public domain of the United States, subject to settlement and occupancy by persons qualified to enter lands, and acquire the title under the provisions of the homestead laws of the United States, relating thereto. In the summer of 1901, one C. C. Cole was a person over 21 years of age, qualified to enter [21*] the public lands of the United States, and acquire title thereto under such homestead laws; and said Cole settled upon said lands and claimed the same with the intention of acquiring title as a homestead when said lands should be open to such entry.

Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell, who was a citizen of the United States, and qualified to enter lands and acquire title under the homestead laws, and he at once took possession of said lands with the intention of acquiring title thereto, under the homestead laws, and he established a residence thereon, built houses and sheds, fenced and cleared ground, and posted notices showing the particular lands claimed by him, and continued to reside on said lands until in the spring of 1906, when for a valuable consideration he sold and conveyed his possessory rights to one Thurston, who entered upon said lands for the

*Page-number appearing at foot of page of original certified Transcript of Record.

purpose of acquiring title, and he was a qualified citizen and entitled to enter public lands, and he so entered this land for the purpose of acquiring title under the homestead laws and so continued in possession until in November, 1906, when he, for a valuable consideration, sold and conveyed his improvements and possessory rights to said lands to Peter Beebe. Said Beebe was a citizen of the United States and qualified to enter such land, and at once entered into possession of such land with the intention of acquiring title thereto from the United States under the provision of the homestead laws, and he made improvements and occupied such land for the purpose aforesaid.

While said Beebe was so in possession, and in the month of September, 1909, and for a valuable consideration, he sold and conveyed his possessory rights, and the improvements on said lands to plaintiffs and relinquished said rights; and plaintiffs at once entered into possession of said lands, for the purpose and with the intention of acquiring the title thereto from the United States [22] under the provisions of the homestead laws, plaintiffs being and are citizens and qualified to take lands as aforesaid.

That plaintiff and his several grantors have at all times been in the continued open and peaceful possession of said lands, claiming adversely to all the world, except the United States, and each has made improvements and kept posted on the land and on each subdivision thereof, notices showing the land claimed by right of such possession and the inten-

tion to claim the same as a homestead, and plaintiffs have for ten years resided on, cleared land, built houses, fences, roads, and raised stock and crops thereon.

4.

On the 19th of May, 1902, and while the land was actually occupied and being improved by O'Donnell and still unsurveyed, the Great Northern Railway Company under the name of St. Paul, Minnesota & Manitoba Railway Company, and for the use in part of the Bellingham Bay Improvement Company filed in the office of the United States Land Office at Seattle, list 44, selecting said land amongst others as a lieu selection under the provisions of the act of Congress approved August 5th, 1892.

In making said selection said defendant represented said land as open, unoccupied, and not claimed by anyone and free from any claim of homestead or initiated right of settlement, and such statements were believed by the officers of the Department of Public Lands and such list was filed in such belief.

5.

Said land was surveyed on February 6th, 1907, and on the 23d of said month defendants described said lands conformable to such survey, which exactly conformed and described the lands herein described and claimed by reason of the possessory rights and improvements made thereon, and the notices posted as aforesaid defining on the ground, the land itself.

6.

When the said selection was made and when it was made to [23] conform to the survey of said lands, defendants knew of the rights and claims to the same by plaintiff and his grantors, and that the same were claimed and settled upon, and that homestead rights in and to the same had been initiated and were being actively asserted, notwithstanding they represented to the Department of Public Lands, and the officers of the Land Department, such lands to be open and free from adverse claims or initiatory rights which such officers believed and acted upon.

7.

On September 27th, 1909, plaintiffs made application to file their homestead entry on and for said lands, tendered the money therefor to pay for such right and filing to the officers of the United States Land and Office at Seattle, which application was rejected without inquiry or investigation by such officers, because of their belief of the representations by such defendants and the filing of said selection list 44.

From such decision plaintiffs were advised to appeal, and did appeal, to the Commissioner of the Land Department, and such rejection was affirmed on December 8th, 1910, the plaintiffs set forth in their appeal proof of the prior occupancy and improvement of such land for the purpose of homestead entry. Afterward said application was appealed to the Secretary of the Interior.

8.

With the application aforesaid, affidavits were presented to the Land Department as hereafter set out, showing the source and nature of plaintiffs' right and afterward on November 18, 1914, the Secretary denied the appeal. On April 8, 1916, plaintiff filed a petition with the Department for the exercise of supervisory authority and with such petition, and as part thereof, presented affidavits. Such proceedings were had thereon that plaintiffs were denied all relief and their application to enter such land was denied. A copy of such proceedings and all the proceedings in the Land Department are herewith filed, hereto attached marked Exhibit "A" and made part hereof. [24]

9.

Afterwards, and while plaintiffs' application was pending, said Thurston made application to enter the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 12, aforesaid, and was permitted by the Land Department to acquire the same. In establishing claim to such land said Thurston represented he was then the owner of the improvements of O'Donnell and that such improvements were on the land he was then seeking, and concealed the fact from the Land Department that such improvements were on the land claimed by plaintiffs, and concealed the fact that he had sold and conveyed to plaintiffs' grantor such improvements, and that plaintiffs were the owners and in possession of the lands entered, and improvements made by O'Donnell and Cole, and adding to such improvements; and he concealed

from plaintiffs the fact he was making use of such improvements for any purpose. The record and proceedings in the Land Department by said Thurston in acquiring the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, of Sec. 12, are filed herewith and made part hereof, marked Exhibit "B".

10.

That said land had become segregated by the occupancy of plaintiffs' grantors, and was not open to selection by the defendants when list 44 was filed.

That the filing of list 44 was a fraud upon plaintiffs' grantors, making defendants trustees for plaintiff in obtaining the patent by misleading the officers of the Land Department.

That the officers of the Land Department erred in judging the land subject to selection by list 44.

That such officers erred in judging plaintiffs were not in privity with Dan O'Donnell in possession and occupancy and right to said land.

That such officers erred in judging that the improvements made by O'Donnell on the West half of Section 12, could be shown by Thurston for obtaining patent to the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 1, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 12. [25]

That said officers erred in judging that because of the use made of plaintiff's improvements, by Thurston, subsequent to his alienation of the rights to the succession of O'Donnell would exclude plaintiff's rights to such land.

That said officers erred in judging the improvements made by O'Donnell and shown by Thurston in

making his final proof were upon the land sought and claimed by plaintiff.

That said officers erred in judging that because Thurston had used plaintiff's improvements in his showing of proof, plaintiffs should have protested, notwithstanding Albert R. McPhee was during all such period actually asserting his right to enter such land before the Department because of his ownership of such improvements and asking such officers to hear his proofs and protest his rights.

That said officers erred in judging that by their assertion that Thurston had used plaintiff's improvements in acquiring other lands after a "field survey" they could excuse their mistake by refusing a hearing permitting plaintiff to show his ownership and occupancy of the land on which improvements existed.

11.

That the officers of the Department aforesaid erred in law, in that plaintiff was refused the right to make proof of his occupancy and the occupancy of his grantors, and have given him the preference right to complete his homestead title to said lands.

12.

That defendants by their representations and concealments aforesaid committed a fraud upon the plaintiff, and their rights, and misled the officers of the United States into error of law regarding plaintiff's equities in said land.

13.

That by reason of said several facts the said lands were not open to be taken by such selection 44, and

have never been in law open to such taking and are not now so open. [26]

14.

On the 24th day of July, 1919, the Land Department, acting on the belief of the truth of the representations and concealments and in error of the legal rights and equities of plaintiffs, issued a patent conveying the legal title of said lands away from the United States to the defendant, Great Northern Railway Company, and it at once conveyed to the codefendant some interest in said land, the extent and nature of which plaintiff cannot definitely say, but by reason of which both defendants are asserting the right to dispossess plaintiff, and deprive them of any right to or further occupancy of such land and are asserting the full ownership thereof solely because of such patent, notwithstanding both defendants had at all times since the placing of list 44 full knowledge of plaintiff's claims and rights to said land and full knowledge of their continued adverse possession under claim of right for more than ten years last past; and the continuous improvements being constantly made by plaintiffs on said lands under such claims.

15.

That a large growth of valuable timber covers a portion of said land, but the land is valuable as productive agricultural land when the timber has been removed, and defendants are asserting they will at once cut and remove such timber and deny plaintiffs any right thereto and to their entire loss, and will do so unless the relief hereafter asked is given.

WHEREFORE plaintiffs pray that defendants be adjudged to hold the legal title to said lands for the use and advantage and benefit of plaintiffs, and declared and adjudged trustees thereof for plaintiffs. That they be required to convey the fee of said lands to plaintiffs; that upon the final hearing they be forever enjoined from asserting any claim to such land, and from removing any timber therefrom; and as to any timber removed pending the hearing of the case on its merits, they be held liable as trespassers and required to pay damages therefor; and failing to comply with any decree the court quiet plaintiff's title to said [27] land and a commissioner be named to convey the same, and they pray for all proper relief in the premises.

S. M. BRUCE,
Attorney for Plaintiffs,
First National Bank Building,
Bellingham, Wash.

State of Washington,
Whatcom County,—ss.

Albert R. McPhee on oath says he is one of the plaintiffs, knows the contents of the foregoing complaint, and the allegations thereof are true.

ALBERT R. MCPHEE.

Subscribed and sworn to before me this 6th day of December, 1920.

[Seal] D. W. FEATHERKILE,
Notary Public in and for the State of Washington,
Residing at Bellingham.

Copy received.

C. W. HOWARD,
For B. B. I. CO.
THOMAS BALMER,
For G. N. Ry. Co. [28]

Exhibit "A."

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Wash.

Serial No. 01723

Receipt No. 158923

APPLICATION.

I, Elbert R. McPhee, a resident of Glacier, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 12, Township 39 N., Range 6 E., W. M. Meridian, containing 120 acres, within the Seattle land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that *I native* born citizen of the United States, and am head of a family; that my postoffice address is Glacier, Washington; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for;

that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws, except _____

Here describe former homestead entry, etc.

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit

of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

ELBERT R. MCPHEE. [29]

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known or has been satisfactorily identified before me by J. C. Graffin, M. D.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described.

And sworn to before me, at my office, in Maple Falls, Whatcom County, Washington, within the Seattle Land District, this 25th day of September, 1909.

C. W. BEAL,

U. S. Commissioner. [30]

UNITED STATES LAND OFFICE.

Seattle, Wash., Sept. 28, 1909.

Mr. Elbert R. McPhee,
Glacier, Wash.

Sir:

Your application to enter under Section 2289, R. S., the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Section

12, Tp. N., R. 6 East, Will. Mer., was received at this office September 27th, 1909. With your application was Money Order for \$10.00 and relinquishment by Peter Beebe of land you applied for. Relinquishment had been placed on record. Enclosed is receipt No. 158923 for the money you paid. Check for \$10.00 will be sent you on application.

Notice is hereby given that your application has been rejected by the Register and Receiver of this office, subject to your right of appeal to the Commissioner of the General Land Office at any time within thirty days.

This land was covered by a lieu selection by the St. Paul, M. & M. Railway Company, long prior to time Peter Beebe, whose relinquishment was with your application, claimed to have settled on the land. List 44 by the Railway Company was approved May 9th, 1902. Beebe claims that he settled on the land August 16th, 1906. When the tracts were selected by the Company in 1902 they were vacant and public.

Beebe's application for the tract was rejected by this office and we were sustained by the Commissioner of the General Land Office.

Very respectfully,

JAMES HENRY SMITH,

Register,

T. H. TWICHELL,

Receiver. [31]

IN THE GENERAL LAND OFFICE OF THE
| UNITED STATES OF AMERICA,
WASHINGTON.

To the Commissioner of the General Land Office,
GREETING:

Comes now your petitioner Elbert R. McPhee, a citizen homesteader of the State of Washington, and a resident of Township (39) and residing on the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 12 of said Town and in Range 6 E. W. M. in Whatcom County, Washington, and most respectfully represents:

That on the 29th day of August, 1909, your petitioner purchased the homestead right to the hereinbefore described lands from one Peter Beebe, who thereupon made and executed a relinquishment to said lands, and the same has been placed of record in the local land office at Seattle, Washington, together with the fee for re-entry in your petitioner's name.

That the former homesteader had commenced and continued permanent improvements on said lands, by erecting a house and commencing the clearing of the same, and that the same have been continued by your petitioner who is a resident of said land with his family.

While the former homesteader located on said land on the 16th of August, 1906, some time prior to the accepting of the final survey of said lands by the Government, and long prior to the opening of said lands for entry by the Government.

That the grounds of rejection by the local land office, are that the St. Paul, M. & M. R. Co. made selection of said lands in May, 1902, that being at a time when said lands were unsurveyed, and not in the market, and not subject to settlement, except by squatter homesteaders.

Your petitioner contends that said lands were not open to entry either by corporations as lieu lands or any other person, save and which took place on the 6th of February, 1907.

That the grounds of rejection of affiants tendered entry on said lands as a homestead was and is, that the St. Paul, M. & M. Ry. Co. made selection of the said lands in 1902, as lieu lands and placed scrip thereon, yet that was at a time when said lands were [32] unsurveyed and not open to entry, or we claim to selection by anyone except by squatter settlers, with a view to a future entry, at such time as the same were open for settlement, and affiant contends that no *froffer* of scrip, or other entry was legal or properly entertained, at that time, but that an actual settler with the intent of making a homestead, and a home on said lands at such time as they might become available, had a squatter's right so to do, and if he showed his good faith by improving or cultivating the land would be entitled to the first consideration, whenever the said lands were duly placed in the market by the Government. It is further respectfully shown that the records of your department will show that at least on two occasions subsequent to the placing of scrip by the said R. R. Co. these and adjacent

lands were withdrawn from the list of public lands, as such, and placed in the forest reserve, such being the fact if the railroad had any vested rights in said lands these acts divested them of them, and they were in their former position, in being entitled to lieu scrip, which could be placed on vacant lands susceptible of being entered; and in no way could said railroad vest title in themselves, except by relocation at such time as the lands were again thrown into the public domain, this the records of your office will show was never done, and at the time of the locating of the predecessor of your appellant, and assignor of his interest he became the first claimant when the time of entry did come, and to that end due tender of the required fee was made, and tender of a homestead entry after the said lands were thrown open on the 6th of February, 1907. In view of the fact that the Railway Company's claimant never made a new entry or in any manner reinstated themselves, gives them no right to claim possession and ownership to certain lands (being the ones in controversy) which at the time of their pretended selection could not be defined by metes and bounds, and seemingly could have been shifted to any section where the lands were the most valuable, regardless of prior claimant, or other rights of any kind or character.

In view of the foregoing facts appellant claims that the Ry. [33] Co. claimant has allowed its rights to lapse, and should be declared without claim or title in or to said lands described, while on the other hand the homestead claimant, and his

successors in interest have complied with all the requirements, and tendered his entry fee, should be declared the sole and legitimate owner, and have the sole and only right to the lands in controversy.

WHEREFORE: Appellant prays, that the matter in controversy be remanded back to the local land office for a hearing on its merits, and that your appellant be heard as to his claims and rights in the premises, to the end that justice may be done to the honest claimant, and the ends of justice subserved.

J. N. PHILLIPS,
Attorney for Appellant.

State of Washington,
County of Whatcom,—ss.

Elbert R. McPhee, being first duly sworn, on oath says that he is the homestead claimant, and appellant hereinbefore mentioned, that he has caused the foregoing appeal to be prepared, and the enclosed notice of the same served on the appellant, that he has read and knows the contents of the foregoing appeal, and that the same is true to the best of his knowledge and belief.

ELBERT R. MCPHEE.

Subscribed and sworn to before me this 23d day of October, A. D. 1909.

J. N. PHILLIPS,
Notary Public in and for the State of Washington,
Residing at Bellingham. [34]

(Copy)

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, May 7, 1910.

Homestead Application 01723

Held for rejection subject to
appeal.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

On September 27, 1909, Elbert R. McPhee filed homestead application 01723, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E.

In May, 1902, the St. Paul, Minneapolis and Manitoba Railway Company selected said tract of land per list 44, under the act of August 5, 1892 (27 Stat. 390). The plat of survey for the tracts in question was filed in the local office on February 6, 1907, and on February 23, 1907, the company described anew the same lands, as conforming to the survey.

You rejected McPhee's application to make homestead entry for the said W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., for the reason that the land had been selected by said railway

company, May 9, 1902, per list 44, and which was adjusted to the survey on February 23, 1907.

From your action Elbert R. McPhee filed an appeal to this office, based on the ground that, on August 29, 1909, he purchased the homestead right to the tracts in question from one Peter Beebe, who alleged settlement upon the land August 16, 1906, and relinquished his claim to the same to said Elbert R. McPhee. [35]

No. 16930, P. 2.

It appears that, when the company made its selection of these tracts of land, May 9, 1902, they were vacant public lands, and the tracts specified as a basis for the selection were situated within the limits of its grant and relinquished at the request of the department, under act of August 5, 1892, *supra*, and became a proper basis of the selection of other lands in lieu thereof. Your action is therefore approved, and applicant is allowed sixty days after notice within which to appeal to the Secretary of the Interior.

You will notify him hereof and also notify Thomas R. Benton, St. Paul, Minnesota, attorney for said railway company.

In due time make proper report as to the action taken by Elbert R. McPhee in the premises.

Very respectfully,

S. V. PROUDFIT,

Assistant Commissioner.

BOARD OF LAW REVIEW.

By W. B. PUGH. [36]

In the Interior Department of the United States
of America, Washington, D. C.

No. 01723.

APPEAL TO THE SECRETARY OF THE
INTERIOR.

ELBERT R. MCPHEE,

Appellant,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAIL-
WAY COMPANY.

In re the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the
SW. $\frac{1}{4}$, Section 12, Township 39 N. of R. 6 E.

Comes now the appellant and appeals from the
order of the General Land Office rendered in this
case, wherein the finding of the local land office
rejected appellant's application for a homestead
entry on the above-named lands, and for the rea-
sons following, to wit:

I.

The present occupant, your appellant, succeeded
to the rights of the original squatter homesteader,
Al. Small, who *abandon* all rights, on September
27th, 1909, by filing of homestead application No.
01723 for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$
of the SW. $\frac{1}{4}$ of Section 12, Township 39 N., R. 6
E., Whatcom County, Washington.

II.

That said appellant purchased the right to the
improvements on the lands claimed, from one Peter

Beebe, who was the original successor of one Dan O'Donnell, who in September, 1896, went upon and claimed said land as a homestead and improved said lands prior to the official survey thereof and long prior to any attached rights on the part of the script claimants, to wit, the St. Paul, Minneapolis & Manitoba Railway.

III.

That on May 9th, 1902, at which time said script selection was made, the said lands were not vacant lands, but were claimed as a homestead and improved, and had been by the said — O'Donnell and his predecessor in the premises.

IV.

That any declaration of intention to occupy public lands [37] on the part of a citizen claimant is to be recognized above and beyond that of any corporation, script claimant coming in later upon said lands.

V.

That at the time it is claimed by the St. Paul, Minneapolis & Manitoba Railway that they placed lieu script upon said lands, the same had been improved to an appreciable extent, and a house and outbuildings constructed, and visible and prominent extension of residence and improvement duly made upon said lands.

VI.

That no right of said lieu script claimant could attach to the lands herein mentioned at a time when said lands were duly occupied and claimed by the legislative claimant.

VII.

That the purview of the law governing settlers' rights is first to conserve all of their interest before admitting any advance claim. That all the files and papers in this case in the archives of the department are made a part of this appeal.

WHEREFORE your petitioner would most respectfully ask that the decisions of the local and general Land Office be reversed, at least in so far as to grant appellant petitioner the right of a review, and that all matters in controversy may be taken up and heard before the local land office in the land district of Northern Washington at Seattle in said state, in order that substantial justice may be done to all parties concerned.

J. N. PHILLIPS,
Attorney for Appellant.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn, deposes and says: That he is the appellant in the foregoing petition, and that he has read the same and knows the facts therein contained and that the same is true to the best of his knowledge and belief.

ELBERT R. MCPHEE.

Subscribed and sworn to before me this 23 day of June, 1910.

J. N. PHILLIPS,
Notary Public in and for the State of Washington,
Residing at Bellingham. [38]

(Copy)

DEPARTMENT OF THE INTERIOR,

Washington. Dec. 8, 1910.

“F”

Seattle 01723.

Homestead Application Rejected.

Affirmed.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

APPEAL FROM THE GENERAL LAND
OFFICE.

Albert R. McPhee appealed from the decision of the Commissioner of the General Land Office of May 7, 1910, rejecting his application for homestead entry for W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington.

May 9, 1902, the St. Paul, Minneapolis and Manitoba Railway Company, by List 4, selected this land under act of August 5, 1892 (27 Stat. 390). The land was then unsurveyed. February 6, 1907, the approved plat of survey was filed in the local office, and February 23, 1907, the railway company adjusted its selection to the surveys. September 27, 1909, McPhee applied for homestead entry, which the local office rejected for conflict with the railway selection, and that action on McPhee's appeal was affirmed by the Commissioner.

McPhee asserts that he is assignee of the rights of a former settler, whom he names in his appeal from the local office as Peter Beebe and in his appeal from the Commissioner of the General Land Office as Al Small, both of whom he says were successors of Dan O'Donnell, who, in September, 1896, went upon and claimed said lands as a homestead and improved them prior to the survey and long prior to any rights on part of the railway company. McPhee claims to have purchased this settlement right September 27, 1909. [39]

Decision No. 17440, P. 2.

There is no evidence in the record of these successive assignments, nor allegations of the time when they were made—if any were made. For all that appears in the record, the alleged former settlers merely abandoned their rights, and McPhee's claim of right appears to have been initiated merely by him as an original settlement. McPhee claims that the land was not subject to selection by the railway company and further that the railway company can not select unsurveyed land. The act of August 5, 1892, *supra*, allows the railway company to select any land "not reserved and to which no adverse right or claim shall have attached, or have been initiated at the time of the making of such selection." It further provides that: "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months

after the land including such tract shall have been surveyed, and the plats thereof filed in the local land office, a new selection list shall be filed by said company, describing such tract according to such survey." The act of itself contemplates clearly that unsurveyed lands may be selected. The selection was before inception of McPhee's claim. No error is shown therefore in the decision, and it is affirmed.

(Signed) FRANK PIERCE,
First Assistant Secretary. [40]

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
CO.

BRIEF OF J. H. CANNON.

To the Honorable Secretary of the Interior:

I.

Said homestead appellant most respectfully urges that a meritorious right to a review of the former decision is vested in said homestead applicant for the reason that said showing and deraignment of the right or title of claimant was not shown in his former hearing in reference to said land and that he was not personally to blame.

II.

That said applicant had an attorney to look after his cause and solely relied upon his preparation of the cause and if a defect in the record was in said cause it was not the fault of said applicant, and he should not suffer this great injury and irreparable wrong, hence in justice we request said Honorable Secretary to review said cause and take into consideration said cause with his additional affidavits.

III.

That said applicant's showing places the right to said land in him as the affidavits of Peter Beebe, H. E. Leavitt, Fred Benson and himself shows this to be the state of facts connected with said land:—said Peter Beebe owned or claimed other land; he made an exchange some time in October, 1906, with J. W. Thurston for an eighty acres of this land; said Thurston being a successor to one Dan O'Donnell who was occupying said land which said McPhee acquired with improvements thereon at the time, viz., May 9th, 1902, when said scrip claimant made the selection of said land hence said land was not subject to scrip location; this fact has been determined by your Honor in the case of John W. Thurston vs. St. Paul, Minneapolis & Manitoba [41] Railway Co.—decided upon March 19th, 1910—being Department No. “E-2630—which said decision I am unable to get the official report in book form but said case was decided by the same Honorable Assistant Secretary, the Honorable Frank Pierce; which held in said cause that if these im-

provements were upon said land then the same was not subject to be located as script land.

IV.

That I most urgently assert that the same improvements which was taken into consideration in said cause is the same identical improvements and were then owned and held by said McPhee and are upon his land; hence I most respectfully urge that said case be taken into consideration by this Honorable Department as a part and parcel of this McPhee case as very material.

V.

That it was there decided that these improvements were upon the land of Thurston and occupied by O'Donnell; hence the preference of homestead claimant was allowed so the only question to be determined is, whose improvements were these. We have established by voluminous evidence showing that they were and always have been upon the McPhee land; hence this is the question only.

I herewith produce four affidavits to that fact together with photo of the same, also showing McPhee successor proper down to and including O'Donnell; hence a conclusion that McPhee is entitled to this land in preference to said scrip claimant, said defendant.

VI.

And I further urge that if this department is not satisfied as to the exact location of said building then an inspection or field officer be sent out to inspect and report and said applicant has *no fear* of the result.

VII.

I will not encumber the time of the Department by citing authorities upon the point that if land unsurveyed or surveyed is improved, occupied, reserved or an adverse claim has been initiated or [42] attached as the act of March 2d, 1899—30 St. 933, expressly points this and is so held by said Department in:

Luts vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 37.

Frank — vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 193.

Frank — vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 502.

and this Thurston case decided March 19th, 1910.

Hence I urge that, upon review, this land with improvements should be found upon McPhee's land, then a hearing should be ordered between McPhee and this scrip claimant and for such further orders in the premises as your Honor thinks proper.

J. H. CANNON,

Attorney for Claimant Albert R. McPhee. [43]

(Copy)

No. 17440.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.

Washington, January 19, 1911.

ALBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

DEPARTMENTAL DECISION OF DECEMBER
8, 1910, PROMULGATED.

Register and Receiver,
Seattle, Washington.

Sirs:

I enclose herewith two copies of departmental decision of December 8, 1910, in the case of Albert R. McPhee, against the St. Paul, Minneapolis and Manitoba Railway Company, involving the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which affirmed the decision of this office of May 17, 1910, rejecting the homestead application of Albert R. McPhee.

You will notify Albert R. McPhee hereof, and duly report the action taken thereunder, with evidence of service of notice at the expiration of the time allowed for filing a motion for review. See Rules of Practice 76, 77, 78, and circular of March 1, 1900 (29 L. D. 649).

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company hereof.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner. [44]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

Homestead Application of Albert R. McPhee.
E—4436.

ALBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

MOTION FOR REVIEW OF DECISION OF
SEC. OF INTERIOR OF DECEMBER 8,
1910, SERVED BY LOCAL LAND OFFICE
OF SEATTLE, MARCH 22d, 1911, BY REG-
ISTERED LETTER.

Comes now the homestead applicant and moves
your Honorable Department for a review or re-
hearing of said Decision and for cause alleges:

I.

That the land involved in this application is the
W. $\frac{3}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec.
12, T. 39 N. R. 6 E. W. M. Seattle, Land District.

II.

That the claim of title or right to said land by

McPhee is as follows: That upon the south forty acres of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ is the improvements of former claimants "Al Small" and "Dan O'Donnell" J. W. Thurston—Peter Beebe and Final Claimant.

III.

That this Honorable Department did, in decision rendered by it upon March 19, 1910 in case No. "E-2630" case of John W. Thurston v. St. Paul Minneapolis & Manitoba Ry. Co. hear and decide that it was shown that by corroborated affidavits that said land was occupied and improved by "Dan O'Donnell" upon the 9th day of May, 1902, the date of the selection by said Scrip Claimant and therefore not subject to scrip entry; and that *a hearing was ordered*, assuming the position that said O'Donnell *improvements* was upon other land of Thurston's adjoining this [45] claim now in controversy; said Decision being made by the Honorable First Assistant, Sec. Frank Pierce; which said Decision applicant expressly refers your Honor to. And affidavits therein and make it a part of this, his Motion for Review.

IV.

That the real facts are that said improvements are upon the McPhee Homestead or land and were so erected and built there; and not upon the land sought by said Thurston; and in no way connected therewith; that said McPhee owned the same and succeeded to the same by virtue of the purchase of the same from one Peter Beebe, which is fully set

forth in accompanying affidavits submitted herewith.

V.

That in said decision it was intimated that the Records did not show these facts, but we assert that it was not the fault of said Homestead applicant.

VI.

That said homestead applicant prays for a Review of said cause and to take into consideration said additional affidavits so that justice will to him be done.

VII.

That said applicant be granted a filing upon said land or that this Honorable Department order a hearing to determine the rights of said applicant and said scrip claimant and for such further orders as may seem meet and according to law.

J. H. CANNON,

Attorney for Albert R. McPhee, Maple Falls, Washington. [46]

State of Washington,
County of Whatcom,—ss.

Peter Beebe, first after being duly sworn, say that I am a native born citizen of the United States of the age of 54 years. My postoffice address is Glacier, Washington. I have resided in Whatcom County, State of Washington for nine years last Past next preceding the making of this affidavit. That I have been acquainted with the lands in Sec. 12 T. 39 N. R. 6 E. since the 18th day of August, 1906. That I did have a homestead in said sec.

and in Sec. one adjoining the same. Firstly being the $S.1\frac{1}{2}$ of $SW.1\frac{1}{4}$ of Sec. 1 and the $N.1\frac{1}{2}$ of the $NW.1\frac{1}{4}$ of Sec. 12. That I held the same until on or about the *month of November*, 1906 at which time I entered into an agreement or exchange with J. W. Thurston who postoffice address is Glacier Wash under the following condition that for the sum of \$50.00 paid me by said Thurston I then transferred my right of claim holding *first* to the $SW.1\frac{1}{4}$ of the SWP. of Sec. 1 & $W.1\frac{1}{2}$ of $NW.1\frac{1}{4}$ & $NW.1\frac{1}{4}$ of $SW.1\frac{1}{4}$ of Sec. 12 all of said land being in T. 39—N. R. 6 E. W. M. That I made final proof upon the 40 acres in Sec. 1 on October 5—1909 That on or about the 20th day of Sep 1909, I released the land in Sec. 12 and sold my improvements thereon to Elbert R. McPhee for the sum of \$50.00 and he with his family has resided continuously and now resides upon said land.

PETER BEEBE.

Subscribed and sworn to before me the 17th day of April, 1911.

[Seal]

J. H. CANNON,

Notary Public in and for the State of Washington,
Residing at Maple Falls. [47]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

State of Washington,
County of Whatcom,—ss.

AFFIDAVIT OF H. E. LEAVITT.

I, H. E. Leavitt first after being duly sworn say that I am a resident of Whatcom County, State of Washington. That my postoffice address is Maple Falls, Washington that I have been acquainted with the land in Sec. 12, T. 39 N. R. 6 E., and especially the $W\frac{1}{2}$ of the North $W\frac{1}{4}$ of said section, both before and after the survey of the same that I have been acquainted with said land for 10 years last past next preceding the making of this affidavit; that the accompanying photograph is a true picture of said O'Donnell cabin upon the south forty acres of said land taken from an Expose at the North end thereof; that said cabin has been at all times upon said land since the Fall of the year 1901. That in the month of April 1902 I was at said cabin and the same occupied and owned at said time by Dan O'Donnell; he had stove provisions and bed and used it as his home; that said cabin is upon the land or claim of said claimant Albert R. McPhee and

said photograph contains the likeness of said McPhee and Family who not reside upon said land but not in this cabin.

H. E. LEAVITT.

Subscribed and sworn to before me this 18th day of April, 1911.

H. J. STRICKFADEN,
Notary Public in and for the State of Washington,
Resident at Maple Falls. [48]

DEPARTMENT OF THE INTERIOR.
WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF FRED BENSON.

State of Washington,
County of Whatcom,—ss.

I, Fred Benson, first after being duly sworn say that I am a native born citizen of the United States My postoffice address is Glacier Washington That I have been acquainted with the land in Section 12, T. 39 N. R. 6 E. for the last six years last past next preceding the making of this affidavit, as particularly the south forty of the west $\frac{3}{4}$ of the NW. $\frac{1}{4}$. That I know of my own personal knowledge for the last five years that the Dan O'Donnell improvements was made and are upon said forty

last aforesaid and upon the land claimed by said Albert R. McPhee That I have considerable experience as a photographer and the accompanying photo is a true fac simile or representation of the building or improvements made by said "Dan" O'Donnell as his predecessors' upon said land and the same represents said claimant Albert R. McPhee and family at said cabin upon his said claim that said McPhee does not now reside in said building but has erected him an other residence upon said land.

FRED BENSON.

Subscribed and sworn to before me this the 18th day of April, 1911.

[Seal] H. J. STICKFADEN,
Notary Public in and for the State of Washington,
Residing at Maple Falls. [49]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF ALBERT McPHEE.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, first after being duly sworn say that I am the claimant in said cause and that

my postoffice address is Glacier, Washington. That I have at all of the times since holding and occupying said land been duly qualified to hold land as a homesteader under the laws of the United States. That I have with my wife and family of three children continuously reside upon said land since the month of September, 1909. That at said time I purchased the improvements upon said land from one Peter Beebe who was a qualified homesteader under the laws of the United States, paying him therefor \$50.00. Said improvements consisting of a building and a small amount of clearing and trail upon said lands the same being and consisting of log and frame building being about 16x18 feet in size with floor, windows and door and reasonably complet and had been used and resided in by one Al. Small and one Dan O'Donnell. That said improvements were upon the south forty acres of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 39 N., R. 6 E. and upon the land prior to my acquiring the same and held by Peter Beebe, who had held the same and acquired the same from one J. W. Thurston, the said Beebe and Thurston in so arranging their respective claims so as to come and near to the County road. Said Thurston had paid and did pay said Beebe \$50.00 and surunder to said Beebe possession of said W. $\frac{1}{2}$ of NW. $\frac{1}{4}$. Said Thurston being a successor to said land from and through one Dan O'Donnell; who as affiant verily believes held and accepted said land and resided in said [50] residence upon May 9th, 1902, the date of the selection of the same by said scrip claimant. Said

O'Donnell and said Al Small were qualified under the Laws of the United States to hold and acquire land under the Homestead acts. That the accompanying Photo is a true picture from the North end of said building and improvements therein erected there by said all Small and acquired by said O'Donnell and said Thurston—and Beebe—and finally claimant. That I have measured the distance from the line upon the west side of J. W. Thurston's land and that said building and improvements is approximately 40 rods in distant from the land of said Thurston and thoroughly (?) understood was and is upon said land of claimant aforesaid—which was transferred and acquired by said Peter Beebe my predecessor as aforesaid.

That said land was acquired by All Small in the year of 1901 occupied by him until the month of March, 1902, when he disposed of the same to *said Dan O'Donnell he occupied the same until the Fall of 1906 when said O'Donnell disposed of the same to Thurston. Then said Thurston at about said time as affiant believes transferred the same to Beebe who held the same until September, 1909, when he disposed of the same including said O'Donnell improvements to this affiant* affiant continuously since said time with his family resided upon said land. These facts and circumstances I made known and informed my counsell and attorney in this cause and as indicated in your decision if they were not properly placed in the Record affiant is not in Fault hence this affidavit.

ALBERT R. MCPHEE.

40 *Great Northern Railway Company et al.*

Subscribed and sworn to before me this 18th day
of April, 1911.

H. J. STRICKFADEN,
Notary Public in and for the State of Washington,
Residing at Maple Falls. [51]

DEPARTMENT OF INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF J. H. CANNON.

State of Washington,
County of Whatcom,—ss.

I, J. H. Cannon, first after being duly sworn,
say: that I have examined the premises herein in
controversy and the facts in said cause and I be-
lieve from said inspection that said applicant's
cause and Motion is a meritorious one and that said
application for a review is not made for delay.

J. H. CANNON.

Subscribed and sworn to before me this 19th day
of April, 1911.

[Seal] H. J. STRICKFADEN,
Notary Public in and for the State of Washing-
ton, Residing at Maple Falls. [52]

Maple Falls, Washington, June 24th, 1912.

Hon. Commissioner,

General Land Office,

Washington, D. C.

Sir:

I have the honor to refer to Homestead application for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, Tp. 39 N., R. 6 E. W. M.

My application was suspended by the local office on account as alleged of application to scrip by Gt. N. R. R. Co.

I forwarded direct to you evidence showing prior settlement by myself and also by Peter Beebe and old soldier whose relinquishment I purchased for a valuable consideration. I have resided and *and* am now residing on my homestead with myself and wife and three children. Special Agent Dave of the Forest Department visited my place *a* stayed a day or two with me, he stated that my improvements and residence was first class.

I would be very much pleased if I could get an early entry on my homestead and hope that you may allow the said at the earliest time compatible with the rules and regulations.

Yours truly,

ALBERT R. MCPHEE. [53]

Seattle, Washington, May 19, 1914.

Honorable Commissioner,
General Land Office,
Washington, D. C.

Sir:

I enclose herewith my authority to make inquiry concerning the following matter:

Albert R. McPhee of Whatcom County, Washington, on Sept. 27th, 1909, made Homestead application at the Seattle, Wash., District Land Office for W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Tp. 39, N., R. 6 E. W. M. tending the fees upon same, and his application is now Seattle Ser. No. 01723.

The serial book in the Seattle Land Office discloses the fact that this homestead application was rejected for conflict with a certain lieu land selection made by the St. Paul, Minneapolis & Monitoba Railway Company long prior to said homestead application and that subsequent to Sept. 28, 1909, the date of the rejection of Mr. McPhee's homestead application, he appealed to the Hon. Commissioner of the General Land Office, furnishing showing as to prior occupancy or claim by former homestead settlers, and subsequently went to the office of the Hon. Secretary of the Interior on appeal from the rejection by your office sustaining the local land office, and that your office by its letter "F" of Jan. 11, 1911, transmitted departmental decision adverse to Mr. McPhee. The local serial book also discloses that notice of this decision was sent Mr. McPhee March 22, 1911, and subsequent to said last named date, to wit, July 10, 1911, the local office reported

to you that no action had been taken by Mr. McPhee.

The records here disclose no further action but Mr. McPhee still insists that he is an applicant thereto, and has some papers or documents before the department on which he is seeking to base a hearing. My employment consists only in ascertaining, if I can, from your office whether this matter is finally closed against [54] Mr. McPhee or whether there is still pending there a complaint or affidavits filed by Mr. McPhee which will enable him to get a hearing before the local land office as to the occupancy of the land involved at the time of selection by the St. Paul, Minneapolis & Manitoba Railway Company.

Will you kindly advise me thereof?

Yours truly,
JOS. W. GREGORY. [55]

GENERAL LAND OFFICE,
WASHINGTON.

June 5, 1914.

ALBERT R. MCPHEE

vs.

ST. PAUL, M. & M. RY. CO.

ADVICE AS TO STATUS OF WITHIN DE-
SCRIBED CLAIM.

Mr. Joseph W. Gregory,
Central Building,
Seattle, Wash.

My dear sir:

I am in receipt of your letter of May 9, 1914,

transmitting a letter dated May 14, 1914, addressed to you from Mr. Albert McPhee, Glacier, Wash., relative to his application 01723, to make homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 N., R. 6 E., Seattle, Washington, Land District.

In response you are advised that the record in said homestead application was transmitted to the Secretary of the Interior May 17, 1911, on a motion for review of departmental decision dated December 8, 1910, which affirmed the decision of this office of May 10th, 1910, rejecting said Homestead application. The matter is still pending before the Interior Department.

Your letter, together with the letter of Mr. McPhee, has been transmitted to the department for consideration,

Very respectfully,

_____ ,

Commissioner. [56]

(Copy.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

November 18, 1914.

“F”

Seattle, 01723

Motion Denied.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY CO.

MOTION FOR REHEARING.

Motion for rehearing has been filed by Albert R. McPhee of departmental decision of December 8, 1910, which affirmed a decision of the Commissioner of the General Land Office, dated May 7, 1910, rejecting McPhee's application to make homestead entry for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 17, T. 39 N., R. 6 E., Seattle, Washington, land district.

On full consideration of the entire matter, the department finds no reason for reversing or modifying the conclusion heretofore reached in this case, and the motion is denied.

(Signed) A. A. JONES,
First Assistant Secretary. [57]

(Copy.)

No. 19,584.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON.

January 15, 1915.

Decision "F" of May 7, 1910, Declared Final,
and Homestead Application 01723 Fi-
nally Rejected. Case Closed.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
CO.

Register and Receiver,
Seattle, Washington.

Sirs:

On November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing of departmental decision dated December 8, 1910, which affirmed the decision of this office dated May 7, 1910, holding for rejection Albert R. McPhee's application 01723 to make homestead entry for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E., for conflict with lieu selection No. 44, made May 9, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892 (27 Stat. 390), and on December 3, 1914, the record in the above entitled case was re-

turned to this office with the statement that the decision of the Department herein referred to had become final.

Accordingly, decision "F" of May 7, 1910, is hereby declared final, and homestead application 01723 by Albert R. McPhee will stand rejected.

Two copies of departmental decision of November 18, 1914, are herewith inclosed for your use and the files of your office. [58]

No. 19,584, p. 2.

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [59]

Glacier, Wash., May 26, 1915.

Hon. W. J. Bryan,

Sec'y of State,

Washington, D. C.

Honorable Sir:

In the year of Nineteen Hundred Nine (1909) I, Elbert R. McPhee took up a homestead in the state of Washington, County of Whatcom, and have lived from then to date with my wife and three children on said homestead. I have a large amount of land cleared, have forty-eight fruit trees two thousand eight hundred strawberry plants besides a truck patch. The land was occupied by a settler long before said land was placed under script.

Now Mr. Lane of the Dept. of the Interior (in the Ritchie case he having took up a homestead)

gave him his patent upon his finding coal, where in two cases of the same nature he (Mr. Lane) reversed them.

Now Mr. Bryan my case with the Department is (Seattle 01723) and as there are several persons in the same predicament in this locality I write you in regard as to why for one reason can the Railroads hold these large tracts of land without paying taxes. The only thing we want is a fair deal and could you Mr. Bryan give us somewhat of an idea of what to do.

Yours truly,

ELBERT MCPHEE. [60]

GENERAL LAND OFFICE,
WASHINGTON.

June 14, 1915.

Mr. Albert R. McPhee,
Glacier, Washington.

My dear Sir:

I am in receipt of your letter dated May 26, 1916, addressed to Hon. W. J. Bryan, then Secretary of State, referred to the Department of the Interior by the State Department, June 9, 1915, with the statement that you were so advised.

In response you are advised, and in fact you are doubtless aware, that on November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing filed on your behalf, of departmental decision dated December 8, 1910, which affirmed the decision of this office of May 7, 1910, holding for rejection your application 01723 filed

September 27, 1909, to make homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington, land district, for conflict with lieu selection No. 44, made May 9, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under Act of August 5, 1892 (27 Stat. 390). The decision of the Department dated November 18, 1914, concluded with this statement:

“On full consideration of the entire matter the Department finds no reason for reversing or modifying the conclusions heretofore reached in this case, and the motion is denied.”

On December 3, 1914, the record in your claim was returned to this office with the statement that the decision of the Department herein referred to had become final.

Accordingly, by letter “F” of January 15, 1915, decision “F” of May 7, 1910, addressed to the Register and Receiver at Seattle, Washington, was declared final, and your homestead application 01723 rejected. This office is unable to afford any relief in the premises.

Very respectfully,
C. M. BRUCE,
Assistant Commissioner. [61]

December 3-0, 1915.

01723, Seattle, Washington.

Honorable Commissioner

of the General Land Office.

Sir:

Referring to the case of Albert McPhee vs. St. Paul, Minneapolis and Manitoba Ry. Company. I

am advised by the local attorney for Mr. McPhee that steps will be taken to apply for a reopening of this case in the comparatively near future. Accordingly it is requested by them that your Office be advised to the end that no steps be taken by you looking toward the issuance of patent to the railway company on the land involved, namely the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NR. $\frac{1}{4}$ SW. $\frac{1}{4}$, of Sec. 12, T. 39 N., R. 6 E., covered by said company's list No. 4. Will you not kindly see that this is done and notation made on the list.

Very respectfully yours,

SAMUEL T. HERRICK,
Attorney for A. R. McPhee.

I also enter appearance for McPhee and request notice of all action. [62]

April 4, 1916.

01723.

Seattle, Washington.

Honorable Commissioner
of the General Land Office.

Sir:

This is to advise you that I have this day filed in the Department a petition for supervisory authority in the case of Albert R. McPhee vs. St. Paul, Minneapolis and Manitoba Ry. Co., involving the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12, T. 39 N., R. 6 E., Seattle Land District, Washington. Accordingly I renew my previous request that no action be taken looking toward the issuance of patent on the Railway selection of said land,

namely, list 4, dated May 9, 1902, and adjusted to the improved survey on February 23, 1907.

Very respectfully,

SAMUEL HERRICK,

Attorney for Albert R. McPhee. [63]

April 10, 1916.

E—4436.

D—13,396.

Honorable Secretary of the Interior,
Washington, D. C.

Sir:

Referring to petition for the exercise of supervisory authority which I filed a couple of days ago in the case of Albert R. McPhee vs. St. Paul Minneapolis & Manitoba Ry. Co., I advise that careful examination of the record in the case of John Thurston vs. St. Paul Minneapolis & Manitoba Ry. Co. (E—2630, Serial 01662, Seattle) shows the probable reason for the mistake which occurred in these two cases.

The land involved in Thurston's claim, and on which hearing was ordered by the Department on March 19, 1910, and on which final certificate and patent subsequently issued to him, was the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ NW. $\frac{3}{4}$ of section 12, and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12, T. 39, R. 6. Yet at the hearing the three witnesses who probably knew the most about these improvements, namely, John R. Smith, Al Small, and Dan O'Donnell, (the latter two of whom had owned them successively) were interrogated by Thurston's attorney as to the

existence of such improvements on "The N. $\frac{1}{2}$ NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12." In other words, the attorney either wittingly or unwittingly described part of the land actually embraced in the claim of McPhee, and the witnesses thereupon glibly described the improvements, though without specifying on which forty acre tract they were found. Only one of the witnesses appears to have been questioned as to the exact forty acres on which the improvements were located, and he replied he did not know.

The attorney for the Railway Company did not cross-examine any of these witnesses, and did not point out in his appeal the fact that they were testifying as to land not involved in that case. [64] Apparently the Examiner in the General Land Office failed to note the discrepancy also, and there was no appeal from the General Land Office to your Department, where the error could and probably would have been discovered and corrected.

It is true that the other three witnesses, including Thurston himself, merely testified as to the land included in Thurston's claim, but this may have arisen through ignorance on the part of two of them, and through a fraudulent intent on the part of Thurston. The fact remains that the two men who had owned the improvements, namely, Small and O'Donnell, described them as being in a tract, part of which is included in McPhee's claim. Consequently according to the testimony of three out of the six witnesses improvements might well have been located

on McPhee's land, just as we now claim they actually were.

Whether the mistake in question by the attorney and witnesses was made knowingly or not, we cannot say, but it is evident that the adjudication of the case in favor of Thurston, and the subsequent patenting of the land to him, are based either on a mistake in material facts, or upon actual fraudulent intent; also that it was based on carelessness in the General Land Office in failing to note the discrepancy in the description of the land involved. There was certainly such a state of facts as warrants your Department in now reopening both cases and restoring the Thurston land to the Railroad Company, and conferring upon McPhee the land which he or his predecessors in interest actually improved prior to the railroad selection.

Respectfully submitted,
SAMUEL HERRICK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [65]

BEFORE THE HONORABLE SECRETARY OF
THE INTERIOR.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY CO.

Involving Serial 01723

Seattle, Washington.

D—4436.

E—13396.

Comes now Albert R. McPhee, by his attorneys, and respectfully petitions the Honorable Secretary for the exercise of his supervisory authority in the above entitled cause, assigning as grounds therefor the following errors in the Departmental decisions of December 8, 1910, and November 18, 1914, to wit:

I.

ERROR in holding “there is no evidence in the record of these successive assignments, nor allegations of the time when they were made—if any were made,”—these findings being incorrect at least as of the time when the motion for rehearing was denied.

II.

ERROR in deciding “for all that appears in the record, the alleged former settlers merely abandoned their rights, and McPhee’s claim of right appears to have been initiated merely by him as an original settlement”—this finding being also incor-

rect as of the date of the denial of the motion for rehearing, at least.

III.

ERROR not to find that the improvements upon this land were located thereon in good faith prior to the date of the railroad selection.

IV.

ERROR in not holding that said improvements were sold by Al Small to Dan O'Donnell in March, 1902, and by O'Donnell later to Thurston, then to Beebe, and finally to McPhee, each of these parties paying for them in turn.

V.

ERROR in apparently giving no consideration to the full showing made by plaintiff on the motion for rehearing, although such showing [66] was suggested and required by the Department's decision on appeal, and a strong *hist* was therein given that if such showing were made said decision would be changed.

VI.

ERROR in not following the Department's decision in *Leete vs. Northern Pacific Ry. Co.*, and *Frank vs. Northern Pacific Ry. Co.* (37 L. D. 37, 193, 502), holding that a settlement on a tract of unsurveyed land at the time of its selection under a railroad grant would defeat that selection, though the settler did not continue to maintain his claim, but sold out to another.

VII.

ERROR in for any reason rejecting McPhee's homestead application.

VIII.

ERROR in for any reason sustaining the railway company's selection.

BRIEF IN SUPPORT OF PETITION.

The land herein involved, to wit: the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 12, T. 39 N., R. 6 E., Seattle, Washington, was selected on May 9, 1902, by the St. Paul, Minneapolis and Manitoba Ry. Co., under the act of August 5, 1892 (27 Stat. 390) while still unsurveyed. After survey said selection was adjusted, and on April 27, 1909, McPhee filed homestead application. Same was successively rejected by the local land office, the General Land Office, and the Department, the decision of the latter being rendered on December 8, 1910.

In said decision the Department thus ruled: "McPhee asserts that he is assignee of the rights of a former settler, whom he names in his appeal from the local office as Peter Beebe and in his appeal from the Commissioner of the General Land Office as Al Small, both of whom he says were successors of Dan O'Donnell, who in September, 1896, went upon and claimed said lands as a homestead and improved them prior to the survey and long prior to any rights on part of [67] the Railway Company. McPhee claims to have purchased this settlement right on September 27, 1909. There is no evidence in the record of these successive assignments, nor allegations of the time when they were made. For all *the* appears in the record the alleged former settlers merely abandoned their rights and McPhee's claim of right appears to have been

initiated merely by him as an original settlement.”

Motion for rehearing of this decision was seasonably filed, accompanied by the affidavits of J. H. Cannon, Fred Benson, Peter Beebe, H. E. Leavitt, and Albert R. McPhee, showing the facts as to the improvements and their successive sale to Beebe et al., and finally to McPhee.

On November 18, 1914, this motion was denied by the Department in a short decision, and the case was finally closed adverse to McPhee on January 15, 1915. Patent has not yet issued to the railway company, however, and the matter is therefore still within the jurisdiction of the Department.

It is evident from the fact *that the said motion for rehearing was pending before your Department for nearly four years*, that the motion was not only very carefully considered, but that likewise there was a strong disposition to allow the same: for otherwise the motion would probably have been denied in the usual course within a month or two. An appeal or motion does not pend before the Department for a long series of years without some good reason existing, that is, either considerable doubt in the mind of the Department as to the correct disposition of that case, or its being involved in a series of cases in which the Department desired to lay down some general rule. It does not appear that the instant case was one of such a group, and accordingly we must infer that the Department had grave doubts as to whether the motion should be denied or should be allowed. This doubt was finally determined in favor of denial, but we submit that

the proper course would have been to allow it, and believe that with more mature consideration such course will be followed. [68] Accordingly the present petition is filed.

There can be no doubt that the Department suggested in its decision, and meant to suggest, that if Mr. McPhee could show the improvements on the land were successively assigned for a valuable consideration, and finally bought by McPhee for such consideration, he would be allowed to prevail under the decisions in the Leete and Frank cases (*supra*) upon which he relied on his appeal upon making such showing, and we submit that the Department should have granted the motion, and cannot understand its failure to do so.

Such failure may possibly have been due to the fact that these same improvements appear to have been claimed by John W. Thurston, as existing on his land adjoining that in controversy, and to have been held by the Department in its decision of March 19, 1910, in the case of said Thurston vs. St. Paul, Minneapolis and Manitoba Ry. Co. (E—2360) to have excepted that land from the railway selection. If that actually be the reason for the Department's denial of the said motion, we submit that it is an erroneous one, as if a mistake were made in the Thurston case it should be rectified by a re-adjudication of that case, and a reinstatement of the railway selection therein—not by punishing an innocent party who had nothing to do with the Thurston case, and whose valuable rights should not be forfeited because of a mistake committed in an-

other case, or possibly because of deception upon the Department in that other case by persons with whom he had nothing to do.

It seems that on the Thurston land final certificate 01662 issued on January 24, 1913, and patent followed not long thereafter. However, the Statute of Limitations on a suit by the Government to set aside said patent has not yet expired, and if the Department believes that deception was practiced, we submit that such suit should be brought, and the land restored to the jurisdiction of the Department so that the railway selection therein could be sustained. Certainly it is not right in the absence of any such action to deny to McPhee the benefit of the improvements actually existing on his own land and paid for by him. [69]

The affidavit of Fred Benson submitted in this case on the motion for rehearing showed that he had known the land here in controversy for six years prior thereto, and particularly the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, upon which were the improvements of Dan O'Donnell. That affiant had had considerable experience as a photographer, and the accompanying photograph is a true representation of said improvements, and of McPhee and family, though at the time of the affidavit McPhee had erected another house on the land, and resided in that.

In his affidavit, Peter Beebe deposed that he had purchased the improvements for \$50.00 and on September 26, 1909, sold them to McPhee for \$50, since which time McPhee had resided continuously on that land with his family.

H. E. Leavitt swore in his affidavit that he had known the land (the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$) for the previous ten years. That the accompanying picture is a true representation of the Dan O'Donnell cabin upon the South forty, *and that said cabin has been at all times on said land since the fall of 1901.* That in April, 1902, affiant saw O'Donnell occupying said cabin as a home.

Albert R. McPhee stated in his affidavit that at all times since occupying said land he has tried to hold it as a homesteader under the U. S. Land Laws. That in September, 1909, he purchased for \$50 the improvements on the claim, and since lived there continuously with his family. Such improvements consisted of a small amount of clearing, a trail, and a log building 16x24 feet, with floor, windows and door. That the said cabin had been used and resided in by Al Small and Dan O'Donnell, then Beebe had acquired same from one Thurston. That upon measurement affiant found these improvements to be 40 rods distant from the land of said Thurston. Said improvements passed from Al Small to Dan O'Donnell, and thence to Thurston, thence to Beebe, and finally to affiant.

The affidavit of J. H. Cannon, accompanying the motion, showed that he himself had examined the premises in controversy, also the facts in the case, and believe that McPhee's cause was a meritorious [70] one. In his brief accompanying the motion Mr. Cannon suggested that if the Department had any doubt as to the location of the improvements,

then an inspector or field officer should be sent out, as applicant had no fear of the results.

It is respectfully submitted that this showing fully met the implied requirements of the Department's decision on appeal, and should have resulted in a vacation of that decision, and an awarding of the land to McPhee. Certainly they brought him fully within the Departmental decisions in the Leete and Frank cases, which were in turn based upon the U. S. Supreme Court decision in the case of *St. Paul, Minneapolis and Manitoba Ry. Co. vs. Donohue* (210 U. S. 21) in which it was held that *"if a bona fide settlement claim had attached to these lands, and was subsisting at the date of the company's proffered selection thereof, the selections cannot stand. It is immaterial that the settlement may have been subsequently abandoned."*

Surely, the Department does not in the present case wish to set aside its previous reported decisions in the cases above mentioned, nor to defy the ruling of the U. S. Supreme Court in the Donohue case. We apprehend upon the contrary that the sole reason for the denial of the motion for rehearing filed by Mr. McPhee's former attorney was the circumstance that it claimed certain improvements previously adjudged by the Department to have been located upon another claim, and to have been the property of another man. If that be the case we must urge again that this is a manifest injustice to the present claimant who, to the best of our knowledge, was not concerned in nor connected with the Thurston case, and who was not in any

way at fault for the determination that the disputed improvements were upon the Thurston land, and were the property of Thurston. If one claimant acting in good faith is to be punished for fraud and wrong doing of another claimant, merely because that other happens to be on adjoining land, and because his case happens to come before the Department first, then we urge that the rights of any settler on the public domain are in jeopardy. And if the Department in two [71] cases involving lands lying side by side, and involving facts practically identical, renders diametrically opposite decisions, then the confidence of these unlearned in the law in the *quasi*-judicial powers and functions of the Interior Department will be somewhat shaken.

We believe, however, that the Department must have misunderstood some of the facts in this case, and that upon a more mature consideration thereof the previous decisions will be vacated, and the homestead application allowed even though it becomes necessary to file suit in the courts to set aside the patent issued to Thurston.

With a prayer that such action be taken, this case is

Respectfully submitted,
SAMUEL HERRICK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [72]

BEFORE THE HONORABLE SECRETARY OF
THE INTERIOR.

Involving Serial 01723
Seattle, Washington.

ALBERT (not ELBERT) R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

D—13396.

Comes now Albert (not Elbert, as stated in the various decisions) R. McPhee, by his attorneys, and respectfully moves the Honorable Secretary a second time for the exercise of his supervisory authority in the above-entitled matter, assigning as grounds therefor the following errors in the Department's decision of April 18, 1916, to wit:

I.

ERROR in finding as a fact of importance in the case that McPhee "failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon"; at least in the absence of any showing that McPhee knew or should have known of the circumstance that Thurston claimed by reason of a settlement made upon part of the land embraced in McPhee's claims.

II.

ERROR in holding that McPhee's delay for a year since final decision of the Department before filing his first petition for the exercise of supervisory authority could prevent him from securing

relief against the fraud which had been perpetrated against him, against the United States, and against the Great Northern Railway Company.

III.

ERROR in considering and adjudicating McPhee's claim as based upon privity in contract with rights of O'Donnell. As a matter of fact McPhee claimed from Beebe, who had purchased from John W. Thurston the latter's rights in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 12. [73]

IV.

ERROR in for any reason declining to take steps to right the wrong which has been done in this case, and to punish the fraud which has been committed therein.

And as further grounds petitioner filed herewith, and prays to be taken as a part hereof, the affidavits of Peter Beebe, E. M. Magner, Al Small, Fred Benson, Dan O'Donnell, Albert R. McPhee, and H. C. Thompson.

The two affiants last named explain the cause of the delay which transpired in the matter of filing the first petition for supervisory authority in this case. - It is that he never received notice of the decision of the Department denying his motion for rehearing until the month of January, 1915; that he was then advised by his attorney residing in Maple Falls, Washington, that said attorney could do nothing further for him; that affiant then went to the City of Seattle, and consulted two attorneys regarding the case, but as they both required a

cash retainer fee of \$100 before proceeding to represent him, and as he was unable to raise that sum of money, he returned to his home at Glacier, Washington, and went to work as a common day laborer in order to secure sufficient funds with which to employ an attorney; that about the 15th of August he consulted H. E. Thompson, Esq., of Bellingham, Washington, and made arrangements with the latter's firm for representation of him. Mr. Thompson shows that about the middle of August he wrote a letter to a certain attorney in Washington requesting the latter's employment in this case, and did not learn from said attorney until a month and a half later that he would not care to undertake such employment; affiant then immediately began to seek some other attorney, and in the month of December entered into negotiations with the writer of this brief, resulting in the making of arrangements in the month of January, but that delay of thirty or sixty days was occasioned after that date because of the fact that it was necessary for McPhee to raise the sum of \$50, which he did as soon as possible. [74]

It is earnestly submitted that these two affidavits fully explained the delay which occurred in this case, and proved that there were no laches or negligence on the part of Mr. McPhee. A common day laborer, living in a small town in the State of Washington more than three thousand miles from the seat of Government, whose own attorney refuses to proceed further in the case, and who makes an unavailing trip to the principal city of his own State in an effort to get other attorneys, but failed;

who then goes to work to earn money with which to employ someone else, and finally secures a firm of attorneys in another city, which firm is delayed for several months in employing an associate in this city—it is easy to be perceived that the claimant is not to be censured for the delay, but that he has used all due diligence. The case would be quite different were he a man of means, or a man of much education, or one living in a land office town, or in the capital city of the Nation.

Coming now to the merits of the case, we find that the Department holds against McPhee partially for the reason that the adjudication in favor of Thurston by the Department was “without objection from McPhee.” McPhee’s affidavit filed herewith, however, shows that he never had any knowledge or information until December, 1914, leading him to believe that John W. Thurston was using the improvements located on affiant’s land in making his proof; that Thurston had never asserted any claim of any kind or character to any land in the W.1/2 of the W.1/2 of Section 12, and affiant therefore paid no attention to any hearing had by said Thurston at the Land Office at Seattle, nor was he notified of any such hearing, nor that any of affiant’s rights were prejudiced by reason of any proofs made therein.

This satisfactorily answers one of the Department’s objections. Another one is that “no affidavit by O’Donnell has been filed by McPhee.” In response to that we have secured and file herewith the affidavit of O’Donnell showing his connection

with this land from the time of his purchase from C. C. Cole, in October, 1901, until his transfer to Thurston in the spring of 1906, each of these transactions [75] being for a consideration of \$100; also "that it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole."

The affidavit of Peter Beebe, filed herewith, shows that in November, 1906, he entered into an exchange agreement with Thurston whereby he released to Thurston the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 1, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12, and in consideration of which Thurston relinquished and transferred to Beebe all of his rights to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12; that at that time a log cabin was located upon the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12; that about September 20, 1909, affiant released said lands and all the improvements thereon to Albert R. McPhee for the sum of \$50 cash; that McPhee thereupon immediately went upon said land with his family, took up his residence, and made other improvements on it. "That affiant has been well acquainted with the location and character of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12, for ten years last past; *that affiant knows of his own personal knowledge that there were no improvements of any kind, character, or description upon any of said land last described prior to August,*

1906; said land last described being the land upon which patent was issued April 29, 1913, to John W. Thurston.''

This affidavit of Beebe is fully corroborated by E. M. Magner, who was present at the time of the transfer from Beebe, to McPhee, knows about the improvements erected on that land, and also knows as to the lack of any improvements prior to January 1, 1906, on the land patented to John W. Thurston.

Al Small, who was one of the witnesses for Thurston at the hearing between the latter and the St. Paul, Minneapolis and Manitoba Railway Company, shows that the improvements in question were located upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and that to Small's personal knowledge there were no improvements on the land subsequently patented to Thurston [76] prior to the time of Thurston's making some about the year 1906.

A similar affidavit is supplied by Fred Benson.

It is earnestly submitted that this constitutes a very strong showing for the petitioner, and *on* which both justifies and requires a reopening of this case. It is evident from a consideration of the Department's last opinion that it labored under a misunderstanding as to the facts of this matter, namely, that McPhee was claiming some privity with O'Donnell. As a matter of fact McPhee does not claim from O'Donnell except that O'Donnell transferred to Thurston, Thurston to Beebe, and Beebe to McPhee. We believe that in our previous motion we did not make it clear that Thurston at one

time claimed the land on which the improvements were made by reason of the assignment from O'Donnell, but by a subsequent transaction Peter Beebe, and later Albert McPhee succeeded to all his rights and interests in said land, and the improvements thereon. Had Thurston not disposed of his claim to land in the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 12, the adjudication in his favor would have been correct, but having made such disposition the decision in his favor was absolutely erroneous since it resulted in the issuance of patent to him for land in section 1, and in the E. $\frac{1}{2}$ of section 12, by reason of improvements located prior to 1906 on the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 12.

Under these circumstances the adjudication in favor of Thurston was entirely erroneous, and amounts to a fraud upon the rights of McPhee.

In our letter to your office of April 10, 1916, in support of the first petition for the exercise of supervisory authority, we invited your attention to the probable reason for the mistake which occurred in the two cases.

The land involved in Thurston's claim, and on which hearing was ordered by the Department on March 19, 1910, and on which final certificate and patent subsequently issued to him, was the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 12, and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12, T. 39 N. R. 6. Yet at the hearing the three witnesses who probably [77] knew the most about these improvements, namely, John E. Smith, Al Small, and Dan O'Donnell (the latter two of whom had owned them

successively), were interrogated by Thurston's as to the existence of such improvements on "The N. $\frac{1}{2}$ NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12," in other words, the attorney either wittingly or unwittingly described part of the land actually embraced in the claim of McPhee, and the witnesses thereupon glibly described the improvements, though without specifying on which forty acre tract they were found. Only one of the witnesses appears to have been questioned as to the exact forty acres on which the improvements were located, and he replied that he did not know.

The attorney for the Railway Company did not cross-examine any of these witnesses, and did not point out in his appeal the fact that they were testifying as to land not involved in that case. Apparently the Examiner in the General Land Office failed to note the discrepancy also, and there was no appeal from the General Land Office to your Department, where the error could and probably would have been discovered and corrected.

It is true that the other three witnesses, including Thurston, himself, merely testified as to the land included in Thurston's claim, but this may have arisen through ignorance on the part of two of them, and through a fraudulent intent on the part of Thurston. The fact remains that two *two* men who had owned the improvements, namely, Small and O'Donnell, described them as being in a tract, part of which is included in McPhee's claim. Consequently according to the testimony of three out of the six witnesses improvements might well

have been located on McPhee's land, just as we now claim they actually were.

Whether the mistake in question by the attorney and witnesses was made knowingly or not, we cannot say, but it is evident that the adjudication of the case in favor of Thurston, and the subsequent patenting of the land to him, are based either on a mistake in material facts, or upon actual fraudulent intent; also that it was [78] based on carelessness in the General Land Office in failing to note the discrepancy in the description of the land involved. There was certainly such a state of facts as warrants your Department in now reopening both cases and restoring the Thurston land to the Railroad Company and conferring upon McPhee the land which he or his predecessors in interest actually improved prior to the railroad selection.

We again call your attention to the fact that motion for rehearing of the Department's decision of December 8, 1910, *was pending before your office for nearly four years* before it was finally adjudicated in favor of the railroad company. From this it is manifest that the motion was not very carefully considered, but that likewise there was a strong disposition to allow the same; for otherwise the motion would probably have been denied in the usual course within a month or two. An appeal or a motion does not pend before the Department for a long series of years without some good reason existing, that is, either considerable doubt in the mind of the department as to the correct disposition of that case, or its being involved in a series of cases

in which the Department desired to lay down some general rule. It does not appear that the instant case was one of such a group, and accordingly we must infer that the Department had grave doubts as to whether the motion should be denied or should be allowed. This doubt was finally determined in favor of denial, but we submit that the proper course would have been to allow it, and believe that with more mature consideration such course will be followed. Accordingly the present petition was filed.

There can be no doubt that the Department suggested in its first decision, and meant to suggest, that if Mr. McPhee could show the improvements on the land were successively assigned for a valuable consideration, and finally bought by McPhee for such consideration, he would be allowed to prevail under the decisions in the Leete and Frank cases (*supra*) upon which he relied on his appeal upon making such showing, and we submit that the Department should have granted the motion, and cannot understand its failure to do so. [79]

Surely, after the Department had the case under consideration for about four years before rendering its decision, and was in grave doubt during all that time as to the proper disposition of it, or else had possibly pigeon-holed the case through carelessness of some official or some clerk, it is in no position to object at the present time to delay on the part of McPhee of one year, or one-fourth of the time aforesaid. If four years be no unreasonable time for a great Department, equipped with a large staff

of able officials, and learned lawyers, surely one year is not unreasonable for a poor common day laborer in the back woods of the State of Washington, three thousand miles distant from the seat of Government, having one lawyer who refused to go ahead with his case, successively applying to two others who turned him down, thence seeking the services of a practitioner in the District of Columbia, who also, after some delay, refused to take the case. We do not mean to criticise the Department for the delay of four years in the adjudication of the case, as there probably was an excellent reason for that, namely, a doubt in the minds of the officials as to how the case should be decided; but we do say that since the Department is in no way blameworthy for that delay, so the claimant should not be censured for the delay of about one-fourth of that time, especially in view of the reasons he now shows as to his inability to get an attorney who would promptly take the matter up for him, and as to his own financial circumstances and station in life.

The affidavits now filed, together with those previously placed on file, show conclusively that a mistake was made in the issuance of patent to John W. Thurston upon land adjoining that here in controversy. That mistake should *not* be rectified by a readjudication of the case, and a reinstatement of the railroad selection therein—not by punishing an innocent party who had nothing to do with the Thurston case, and whose valuable rights should not be forfeited because of a mistake committed in another case, or possibly because of deception prac-

ticed upon the Department in that other case [80] by persons with whom he had nothing to do.

In conclusion we refer again to the affidavits of Benson, Beebe, Leavitt, McPhee, and Cannon, filed in connection with the motion for rehearing, and to which we invite particular attention in the first petition for the exercise of supervisory authority.

It is respectfully submitted that that showing, together with what is now made, completely answers every objection raised by the Department in its three decisions in this case, namely, the decision on appeal, the decision on motion for rehearing, and the decision on the first petition for the exercise of supervisory authority. Certainly they bring Mr. McPhee fully within the Departmental decisions in the Lette and Frank cases, which were in turn based upon the U. S. Supreme Court decision in the case of St. Paul, Minneapolis and Manitoba Ry. Co. vs. Donohue (210 U. S. 21), in which it was held that *"if a bone fide settlement claim had attached to these lands, and was subsisting at the date of the company's proffered selection thereof, the selections cannot stand. It is immaterial that the settlement may have been subsequently abandoned."*

Surely, the Department does not in the present case wish to set aside its previously reported decisions in the cases above mentioned, nor to defy the ruling of the U. S. Supreme Court in the Donohue case. We apprehend upon the contrary that the sole reason for the denial of the motion for rehearing filed by Mr. McPhee's former attorney was the

circumstance that it claimed certain improvements previously adjudged by the Department to have been located upon another claim, and to have been the property of another man. If that be the case we must urge again that this is a manifest injustice to the present claimant who, to the best of our knowledge, was not concerned in or connected with the Thurston case, and who was not in any way at fault for the determination that the disputed improvements were upon the Thurston land, and were the property of Thurston. If one claimant acting in good faith is to be punished for fraud and wrong doing of another claimant, merely because that other happens to be on adjoining land, and because his case happens to come before the Department first, [81] then we urge that the rights of any settler on the public domain are in jeopardy. And if the Department in two cases involving lands lying side by side, and involving facts practically identical, renders diametrically opposite decisions, then the confidence of those unlearned in the law in the *quasi-judicial* powers and functions of the Interior Department will be somewhat shaken.

We believe, however, that in view of the showing now made, which answers fully every objection raised in the last Departmental decision, the previous decisions will be vacated, and the homestead application allowed—even though it becomes necessary to file suit in the courts to set aside the patent issued to Thurston. That is, however, a matter with which we are not concerned, as such suit would result for the benefit of the railway company which

is now profiting by the mistake made, at least so far as the rights of Mr. McPhee are concerned.

All of which is again prayerfully and respectfully submitted.

SAMUEL HERRCK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [82]

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

D—13396.

April 18, 1916.

“F”

Seattle 01723.

Homestead application rejected.

Denied.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

PETITION FOR THE EXERCISE OF SUPER-
VISORY AUTHORITY.

April 8, 1916, Elbert R. McPhee filed a petition for the exercise of the Departmental supervisory authority in the matter of his homestead application No. 01723, filed September 27, 1909, at Seattle, Washington, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., W. M., which was ordered rejected by the Department's decisions of December 8, 1910, and November 18, 1914, for conflict with selection list No. 44 (Seattle 01653), filed

May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under the act of August 5, 1892 (27 Stat. 390). McPhee's application was finally rejected and the case closed by the Commissioner of the General Land Office January 15, 1915.

No explanation is offered for the long delay in filing the petition and it might properly be denied upon that ground. However, the petitioner earnestly contends that the department's prior action was erroneous in view of certain affidavits filed April 21, 1911, in connection with a motion for review, and suggest that inasmuch as the land has not yet been patented to the railway company and is still within the jurisdiction of the land department the previous decisions be recalled and a hearing ordered to determine the rights of the parties.

At the time of the filing of the survey of the railway company's selection the land was unsurveyed. The plat of survey was filed in the local land office February 6, 19-7, and on February 23, 1907, the railway company described the same lands as conforming to the survey. [83]

The affidavit of McPhee alleges that the land applied for by him was, in 1901, embraced in the settlement of one Al. Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of the railway company's list. O'Donnell later sold his improvements to John W. Thurston, it being further

alleged that O'Donnell's house or cabin was situated upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, as to which McPhee is corroborated by one Benson. The affidavit of Peter Beebe states that beginning in August, 1906, he claimed a settlement right upon the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12. In November, 1906, however, in consideration of \$50 paid to him by Thurston he changed his claim to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which included the tract upon which O'Donnell's cabin was located. No affidavit by O'Donnell has been filed by McPhee.

The records of the Department disclose that upon February 6, 1907, John W. Thurston made homestead application No. 01662, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1. By departmental decision of March 19, 1910, a hearing was ordered to determine the rights between Thurston and the railway company. At this hearing Small testified that in 1910 he was employed to construct a cabin upon the land by C. C. Cole. Cole sold the cabin before its completion to Dan O'Donnell, who finished it and established residence therein prior to May 9, 1902. O'Donnell also posted a notice of his settlement, but the exact description of the land claimed by him does not appear. O'Donnell testified to his settlement upon the land claimed by Thurston and that he sold whatever rights he had to Thurston in the fall of 1906. Thurston testified that his

purchase from O'Donnell was upon October 22, 1906, and that he himself established residence in December, 1906. Thurston stated in his testimony:

Q. Now when did you take up your residence on the land? [84]

A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.

This may, perhaps, refer to the transaction alleged in Beebe's affidavit. As the result of the hearing, Thurston's application was allowed August 23, 1911. He made final proof September 28, 1912, final certificate issuing January 24, 1913, and patent April 29, 1913.

February 6, 1907, Peter Beebe filed homestead application for the SW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, which was rejected by the register and received as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, to the United States, stating therein that he has transferred "my right and goodwill to E. R. McPhee." The relinquishment which had been purchased by McPhee for the sum of \$50 was filed September 27, 1909, concurrently with his

homestead application. Beebe's application was allowed as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, August 21, 1909 (H. E. 01692), upon which patent was issued April 23, 1915.

From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under his settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Donnell. Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the Department in allowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurston's [85] final proof, which was substantiated by a field investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and had a house, barn and other improvements valued at \$3,000.

O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the Department without objection from McPhee. McPhee purchased Bee-

be's relinquishment after Beebe's application had been rejected, and failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon. He further delayed for a period of over a year since the final decision of the Department against him before filing the present petition. The Department, therefore, sees no reason sufficient to warrant a recall of its former rulings.

The petition is accordingly denied.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary. [86]

No. 20303.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Washington, May 6, 1916.

Homestead Application 01723 rejected. Petition for supervisory authority denied.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILROAD COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

On April 8, 1916, the resident attorney on behalf of Elbert R. McPhee filed in the office of the Secretary of the Interior, a petition for the exercise of supervisory authority in the matter of homestead

application 01723, filed September 27th, 1909, by Elbert R. McPhee, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E., which was ordered rejected by departmental decisions of December 8, 1910, and November 18, 1915, for conflict with lieu selection list No. 44 (01653) filed May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892 (27 Stat. 390). Said homestead application 01723 was finally rejected and the case closed by letter "F" of January 15, 1915.

On April 18, 1916, the First Assistant Secretary of the Interior considered the petition for the exercise of supervisory authority and denied the same and on April 24, 1916, the record in the above-entitled case was returned to this office with the statement that the decision of the Department dated April 18, 1916 had become final.

Accordingly, homestead application 01723 by Elbert E. [87] No. 20303, p. 2.

McPhee will stand rejected. Two copies of Departmental decision of April 18, 1916 are herewith enclosed for your use, and the files of your office. One copy of said decision will be furnished the resident attorney of Elbert R. McPhee. You will advise McPhee hereof. You will make the proper notations upon the records of your office, referring to this letter by date and initial.

You will also advise Mr. Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minne-

apolis and Manitoba Railway Company.

Very respectfully,

D. K. PARROTT,

Acting Assistant Commissioner. [88]

D—13396.

“F”

Seattle 01723.

Homestead Application rejected.

Denied.

ALBERT R. MCPHEE

vs.

ST PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

AFFIDAVITS IN SUPPORT OF PETITION
FOR REHEARING.

State of Washington,

County of Whatcom,—ss.

Peter Beebe, of Maple Falls, Washington, being first duly sworn on oath deposes and says: that he is a native born citizen of the United States of the age of Sixty (60) years. That affiant has resided in Whatcom County, Washington, for Fourteen (14) years last past immediately preceding the making of this affidavit. That affiant has been well acquainted with the lands situated in Section 1, and in Section 12, Township 39, North of Range 6 East W. M., since the year 1906. That about the month of August, 1906, affiant settled upon and claimed as a homestead the South half of the Southwest Quarter of Section 1, and the North half of the Northwest Quarter of Section 12, all in

Township 39, North of Range 6 East W. M., and that he resided continuously thereon until on or about the month of November 1906. That during the month of November, 1906, affiant entered into an exchange agreement with one John W. Thurston for a good and valuable consideration, by which said agreement affiant relinquished and released to the said John W. Thurston his rights in and to the Southeast Quarter of the Southwest Quarter of Section 1, and the Northeast Quarter of the Northwest Quarter of Section 12. That in consideration of said exchange and relinquishment to said Thurston by affiant, and in further consideration of the sum of Fifty Dollars paid to affiant by the said John W. Thurston, said John W. Thurston relinquished and transferred to this affiant any and all rights which he had in and to the Southwest Quarter of the Northwest Quarter of Section [89] 12, and the Northwest Quarter of the Southwest Quarter of Section 12. That at the time of said exchange affiant knows of his own personal knowledge that there was improvements located and situated upon the Southwest Quarter of the Northwest Quarter of Section 12, Township 39, North of Range 6 East W. M., which said improvements consisted of a log cabin of approximately the size of 12' by 16', and certain clearing which had been done upon said forty acres of land consisting of approximately one acre. That on or about the 29th day of September, 1909, affiant released all of his claim in and to all of the lands above described in Section 12, and sold the improvements thereon consisting

of said cabin, and clearing, to Albert R. McPhee, for the sum of Fifty Dollars (\$50.00), which was paid by said McPhee to affiant. That affiant knows of his own personal knowledge that immediately after the transfer of his interest to said Albert R. McPhee that said McPhee went immediately upon said land with his family and took up his residence upon the same and made other improvements upon the Southwest Quarter of the Northwest Quarter of Section 12, and that said McPhee has continuously resided upon said Southwest Quarter of the Northwest Quarter of Section 12, ever since said time up to the present. That affiant executed and delivered to said McPhee a transfer of the improvements located upon said land. That affiant knows of his own personal knowledge that immediately after said transfer one Ed Magner went upon the Southwest Quarter of the Northwest Quarter of Section 12 and erected and constructed additional improvements thereon for the said Albert R. McPhee, all of which said improvements including the cabin formerly located upon said land are now on said forty acre tract. That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39 North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal [90] knowledge that there were no improvements of any

kind, character or description upon any of said land last described prior to August, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston.

PETER BEEBE.

Subscribed and sworn to before me this 8th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [91]

State of Washington,
County of Whatcom,—ss.

E. M. Magner, of Glacier, Washington, being first duly sworn on oath says: That he is a citizen of the United States of the age of fifty-one years. That he has resided continuously in Whatcom County, Washington, for eleven years last past immediately preceding the making of this affidavit. That affiant is well acquainted with the lands situated in Section 12, Township 39, North of Range 6 East W. M. That on or about the 20th day of September, 1909, affiant, for and on behalf of Albert R. McPhee, went upon the Southwest Quarter of the Northwest Quarter of Section 12, and made improvements thereon for said McPhee consisting of a house about 12 feet by 18 feet in size, and built a trail leading to the said land. That affiant knows of his own personal knowledge that at said time there were improvements situated on said Southwest Quarter of the Northwest Quarter of Section 12, consisting of a log cabin about 12 feet

by 18 feet in size and a well defined trail, which showed that the same had been frequently traveled and used. That affiant states that it was generally known in the community of Glacier, Washington, that said log cabin was placed upon said 40 acre tract of land by one Al Small, and was later transferred by the said Al Small to one Dan O'Donnell, and was known in the community as the O'Donnell improvements. That affiant knows of his own knowledge that the said Albert R. McPhee immediately entered into possession of said forty acre tract of land, together with other lands, and he, together with his family have continuously resided upon the same ever since September, 1909. That affiant was present at the time of the transfer made by Peter Beebe to Albert R. McPhee of the improvements and rights to the Southwest Quarter of the Northwest Quarter, and the Northwest Quarter of the Northwest Quarter and the Northwest Quarter of the [92] Southwest Quarter, all in Section 12, Township 39, North of Range 6 East W. M., and that affiant knows that the consideration for said transfer was agreed upon as the sum of Fifty Dollars. That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39, North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal knowledge that there were no improvements of any kind,

character or description upon any of said land last described prior to January 1st, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston.

E. M. MAGNER.

Subscribed and sworn to before me this 8th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [93]

State of Washington,
County of Whatcom,—ss.

Al Small, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of Forty-six years, and that his present Post Office address is Ferndale, R. F. D. No. 1, Washington. That he has been well acquainted with the location and character of lands embraced in Section 1 and Section 12, Township 39, North of Range 6 East W. M., since the fall of 1901. That in the fall of 1901 at the request of one C. C. Cole and employed by said Cole, affiant went upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East, and did some work and made some improvements for the said C. C. Cole and blazed and opened a trail from said land to the county road, and commenced the erection of a cabin upon said forty, which was of approximately the size of 12X18 feet. That affiant partly constructed the said cabin, and that the said C. C. Cole occupied the same and

settled upon the west half of the Northwest quarter of section 12, and the west half of the southwest quarter of Section 12, Township 39, North of Range 6 East W. M., and claimed the same as a homestead about the 1st of September, 1901. That affiant knows of his own knowledge that the said C. C. Cole continued to occupy said land and claim the same as a homestead up until the month of October, 1901, on which date the said C. C. Cole sold and transferred his rights to said homestead and the improvements thereon to one Dan O'Donnell. That affiant knows that said O'Donnell immediately after the purchase of said improvements from said Cole, went upon said land and occupied the same as a homestead and completed the construction of the cabin started upon said land. That affiant was a witness for one John W. Thurston at the time of a hearing in the United States Land Office at Seattle, at which time the said John W. Thurston was attempting to prove that there had been a prior right of homestead [94] and settlement upon certain lands which he claimed as a homestead, said priority being for the purpose of defeating script filed by the St. Paul, Minneapolis and Manitoba Railway Company on such land. That affiant at said hearing testified that the improvements to which he testified were located upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East W. M. That affiant is well acquainted with the land upon which patent was finally issued by the United States Government to John W. Thurston.

and affiant knows of his own knowledge that no improvements were ever made upon any of such lands prior to the time the same were made by said Thurston, which affiant believes to be about the year 1906. That affiant knows of his own knowledge that the improvements used by said Thurston to establish his prior right upon the land which he claimed as a homestead were the same and identical improvements as hereinbefore mentioned by affiant as being located upon the Southwest quarter of the Northwest quarter of Section 12.

AL. SMALL.

Subscribed and sworn to before me this 9th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [95]

State of Washington,
County of Whatcom,—ss.

Fred Benson, being first duly sworn on oath says: that he is a citizen of the United States of the age of thirty-seven years, and that his present postoffice address is Glacier, Washington. That he has been well acquainted with lands in Section 12, Township 39, North of Range 6 East W. M., for eleven (11) years last past immediately preceding the making of this affidavit. That he knows of his own personal knowledge that the improvements on the Southwest quarter of the Northwest quarter of said section commonly known

as the Dan O'Donnell improvements are the same and identical improvements which affiant photographed during the summer of 1910 or 1911 for one John W. Thurston. That affiant knows of his own personal knowledge that said improvements are not upon any part of the land which was finally patented by the United States to said John W. Thurston. That affiant knows of his own knowledge that there were no improvements of any kind or character upon any land upon which patent was finally issued to said John W. Thurston prior to the fall of 1906.

This affidavit is made supplemental to that affidavit of affiant dated April 18th, 1911, and now a part of the record in this proceeding.

FRED BENSON.

Subscribed and sworn to before me this 9th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bel-
lingham. [96]

State of Washington,

County of Whatcom,—ss.

Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of thirty-five years, and that his present postoffice address is Deming, Washington. That on or about the first of October, 1901, he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located

near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no right in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars (\$100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars (\$100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.

DAN O'DONNELL.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bel-
lingham. [97]

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on oath deposes and says: That in the month of January, 1915, he received notice that the Secretary of the Interior at Washington D. C. had on November 18th, 1914, denied the motion of affiant for a rehearing and reconsideration of the decision of said Secretary of the Interior rendered on December 8th, 1910. That affiant was then advised by his attorney J. H. Cannon, of Maple Falls, Washington, that said attorney could do nothing further for affiant in connection with said matter, and that affiant then went to the City of Seattle, Washington, and consulted two attorneys regarding the same. That all of said attorneys informed affiant that they would require a cash retainer of One Hundred Dollars before proceeding to represent him, and that affiant was unable to raise said sum of money, and unable to employ either of said attorneys, and returned to his home at Glacier, Washington, and went to work at common labor by the day in order to secure sufficient funds with which to employ an attorney to further represent him in connection with his application for a hearing. That about the 15th of August, 1915, affiant consulted with H. C. Thompson, an attorney at law of Bellingham, Washington, and made arrangements with the firm of Kellogg & Thompson by which said firm of attorneys would represent him in his application for a hearing before the Secretary of the Interior at

Washington, D. C. That affiant has always been diligent in trying to press his rights before the Secretary of the Interior, and has made every effort to be represented, but was unable to employ counsel prior to August, 1915, after learning that his application for rehearing had been denied.

This affidavit is made supplemental to that affidavit heretofore made by me on April 18th, 1911, which is now a part of [98] the records and filed in this matter, and I request that the allegations contained in said former affidavit be by the Department considered in connection with this application for rehearing.

Affiant further says that he never at any time had any knowledge or information which would lead him to believe that one John W. Thurston was using the improvements located upon affiant's land, to wit: on the Southwest quarter of the Northwest quarter of Section 12, in making final proof, until on or about December, 1914. That affiant knew that the said John W. Thurston claimed as a homestead some other land adjoining the claim of affiant, but that said Thurston had never asserted any claim of any kind or character to any land located in the West half of the West half of said Section 12, and affiant therefore paid no attention to any hearing had by said Thurston in the Land Office at Seattle, nor was he notified of any such hearing or of the fact that any of affiant's rights were prejudiced by reason of any proof made therein.

ALBERT R. McPHEE.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [99]

State of Washington,
County of Whatcom,—ss.

H. C. Thompson, being first duly sworn on oath says: That he is a citizen of the United States of the age of thirty-eight years, and is an attorney at law engaged in the practice of law at Bellingham, Washington. That on or about the 15th day of August, 1915, affiant was consulted by one Albert R. McPhee concerning his rights in a certain homestead which said McPhee claimed in certain lands located near Glacier, Washington. That at said time satisfactory arrangements were made by which affiant was engaged to represent said McPhee to endeavor to secure for him a rehearing and reconsideration of the decision of the Department of the Interior theretofore entered. That on August 18th, 1915, affiant wrote a letter to an attorney in Washington, D. C., to wit, James I. Parker, of 1410 H. Street, in which affiant requested that said Parker be employed by affiant for the purpose of assisting in the conduct of the application for rehearing. That on August 24th, 1915, affiant received a letter from said James I. Parker in which he said that he would make an examination of the records in said matter and advise affiant later. That on September 30th, 1915, affiant received a letter from said James I. Parker

in which he said he would be unable to handle this matter, and would not care to undertake such employment. That affiant then immediately began to seek some other attorney who would be willing to enter the employ of Albert R. McPhee together with affiant, and on December 8th, 1915, wrote Mr. Samuel Herrick, an attorney at law of Washington, D. C., regarding such employment. That various correspondence was had between affiant and said Samuel Herrick, and on January 10th, 1916, affiant received a letter from said Samuel Herrick in which he agreed to certain terms of employment, and agreed to represent the said Albert R. McPhee in connection with affiant in said matter before the Secretary of the Interior. That a delay of thirty or sixty days was occasioned after said date in the filing of a petition for reconsideration [100] because of the fact that it was necessary for said McPhee to raise the sum of Fifty Dollars, which he did as soon as possible.

H. C. THOMPSON.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,
Notary Public for Washington, Residing at Bel-
lingham. [101]

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

July 10, 1916.

“F”

Seattle 01723

Homestead Application Rejected.
Petition Denied.

D—13396.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

PETITION FOR THE EXERCISE OF SUPER-
VISORY AUTHORITY.

Elbert R. McPhee has filed a petition for the exercise of the Department's supervisory authority in the matter of the rejection of his homestead application for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., W. M.

The case is before the Department for the second time, upon motion for the exercise of supervisory authority. The brief submitted herein has been carefully considered, but it is found that no argument is advanced therein, nor new question raised, that had not been presented and argued when the case was previously here upon similar petition. At that time the petition was denied, in a well-considered decision in which the material facts of the case were fully set out, and the reasons for denying the petition stated.

The case, in its different aspects, has been before the Department at other times, and an examination of the record discloses that the decisions rendered sustaining the original action rejecting the application, and refusing to rescind said action, were fully justified and warranted under all the facts and circumstances appearing.

The petition failing to present any matter which, it would appear, has not heretofore been fully considered, it is proper to deny the same, and it is accordingly so ordered.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary. [102]

No. 20,509.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington.

July 31, 1916.

Promulgating Departmental
Decision of July 10, 1916.

ELBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

Register and Receiver,
Seattle, Washington.

Sirs:

On June 3, 1916, the resident attorney, on behalf of Elbert R. McPhee, filed in the office of the Sec-

retary of the Interior a petition for the exercise of supervisory authority in the matter of homestead application 01723, filed September 27, 1909, by Elbert R. McPhee, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which was ordered rejected by Departmental decisions of December 8, 1910, and November 18, 1914, for conflict with lieu selection list No. 44 (01653), filed May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company, under the act of August 5, 1892 (27 Stat. 39). Said homestead application 01723 was finally rejected and the case closed by letter "F" of January 15, 1915.

On April 18, 1916, the First Assistant Secretary of the Interior considered the petition for the exercise of the supervisory authority, and on April 24, 1916, the record in the case was returned to this office for appropriate action.

On July 10, 1916, the First Assistant Secretary of the Interior considered the second petition filed on behalf of [103] McPhee for the exercise of supervisory authority, and denied the same, and on July 14, 1916, the record in the case was returned to this office with the statement that the decision of the Department hereinbefore referred to had become final. Accordingly, said homestead application 01723, by Elbert R. McPhee will stand rejected and the case closed.

Two copies of Departmental decision of July 10, 1916, are herewith enclosed for your use and for the files of your office. One copy of said decision will be furnished the resident attorney for the

Northern Pacific Railway Company. You will advise McPhee hereof.

You will also advise Mr. Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [104]

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS, AND MANITOBA
RAILWAY COMPANY.

AFFIDAVIT AS TO HOMESTEAD RIGHTS
OF ALBERT R. McPHEE.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on oath deposes and says: That he has made application to perfect title as a homestead to the following described real estate, situated in Whatcom County, Washington, to wit:

The West half of the Northwest quarter; and the Northwest quarter of the Southwest quarter of Section 12, Township 39, North of Range 6 East W. M.

That the St. Paul, Minneapolis and Manitoba Railway Company claim said land by reason of scrip selection made by said railway company on May 9th, 1902. That affiant claims said real estate as a homestead, and that affiant has a prior right in and to the same by reason of prior settlement and

improvement before the filing of said selection by said railway company on May 9th, 1902, and in support of said contention alleges the following facts:

That in 1901 a cabin was constructed upon the Southwest quarter of the Northwest quarter of said Section 12, by one C. C. Cole. That at the time of the construction of said cabin, all rights in and to the improvements and in and to the rights of the claimant C. C. Cole as a homesteader, for a good and valuable consideration of One Hundred Dollars, were transferred by said C. C. Cole to one Dan O'Donnell, who immediately entered into possession of said improvements, and claimed a homestead right on the following real estate:

The West half of the Northwest quarter, and the Northwest quarter of the Southwest quarter, of Section 12, Township 39, North of Range 6 East W. M. [105]

That thereafter in the year 1906, the said Dan O'Donnell, for a good and valuable consideration of One Hundred Dollars (\$100.00), sold and transferred to John W. Thurston, the improvements heretofore mentioned, together with the settlement right upon the real estate claimed by said Dan O'Donnell as a homestead. That thereafter and during the same year, 1906, said John W. Thurston for a good and valuable consideration of Fifty Dollars (\$50.00) entered into an exchange agreement with one Peter Beebe, by which said agreement the said Peter Beebe relinquished to the said John W. Thurston all rights which he might have in and to the Southeast quarter of the Southwest quarter of

Section 1, and the Northeast quarter of the Northwest quarter of Section 12. That in consideration of said exchange and relinquishment and the said sum of Fifty Dollars, the said John W. Thurston relinquished and transferred to the said Peter Beebe any and all rights which he had in and to the Southwest quarter of the Northwest quarter of Section 12, and the Northwest quarter of the Southwest quarter of Section 1*w*, which said land so transferred by Thurston to Beebe contained the original improvements made in the year 1901. That thereafter the said Peter Beebe, for a good and valuable consideration of Fifty Dollars, sold and transferred to this affiant Albert R. McPhee, the improvements hereinbefore mentioned, and also the settlement right upon said real estate. That this affiant immediately entered into possession of said real estate and of said improvements, and has continuously resided upon the same ever since, and does now reside upon said real estate and claims the same as a homestead.

That affiant has been denied the right to claim the same as a homestead by the Department of the Interior of the United States for the reason that the improvements herein mentioned and described as being upon the land of affiant were used by one John W. Thurston in making final proof upon a homestead adjoining the land of this affiant, and on February 6th, 1907, said John W. [106] Thurston made homestead application and finally received patent for the Southeast quarter of the Southwest quarter of Section 1, and the East half of the North-

west quarter, and the Northeast quarter of the Southwest quarter of Section 12, but that said John W. Thurston, in making final proof upon said homestead claim, did use and claim the improvements of this affiant located upon the Southwest quarter of the Northwest quarter of said Section 12. That affiant has prepared and filed with the Department of the Interior affidavits of all of the witnesses used by the said John W. Thurston in making final proof upon his homestead application, showing that the improvements mentioned and described in the final proof of said Thurston are upon the homestead claim of this affiant.

Said Department has rejected the application of this affiant and among other reasons *dor* doing so stated that no objection or protest was ever made by this affiant to the final proof of said John W. Thurston, and in this connection affiant alleges that he never had any knowledge or information to the effect that the said John W. Thurston was using the improvements located upon the land of this affiant for the purpose of making final proof, until the latter part of the year 1914. That affiant has diligently prosecuted his cause before the Land Department in Washington, and the Department of the Interior, but will be greatly defrauded if finally denied his rights herein because of the fraud practiced by one John W. Thurston in making final proof upon his homestead as heretofore alleged. That affiant can secure and present affidavits of all parties ever having any interest in the said homestead claim claimed by affiant prior to the year 1906

and back to the year 1901, and at the time of the construction of the original improvements and settlement, which said time is long prior to the time of the filing of the selection by said railway company.

Wherefore affiant asks that such action may be taken as may fully protect the rights of this affiant to secure for him his homestead rights in the land claimed as heretofore alleged.

ALBERT R. McPHEE.

Subscribed and sworn to before me this 5th day of October, 1916.

JOHN A. KELLOGG, [107]

October 17, 1916.

The Attorney General,
Department of Justice,
Washington, D. C.

Sir:

I have the honor to file herewith an affidavit and other papers in connection with the claim of Albert R. McPhee, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12, T. 39 N., R. 6 E. Washington.

These papers show in brief that McPhee has been a homestead settler on said land in good faith for a number of years past; that the land has been also claimed by the St. Paul, Minneapolis and Manitoba Ry. Co. under a scrip selection made on May 9, 1902; that at that date, and prior thereto, the land was duly claimed by a homesteader named Dan O'Donnell, who had purchased the cabin and the claim from one C. C. Cole, a prior claimant; that this claim and cabin were subsequently acquired by

McPhee through mesne conveyance; that the Interior Department has recognized that the homestead claim and cabin aforesaid would defeat the Railway's scrip, under authority of Departmental and Supreme Court decisions; but that it has already held that the said cabin excepted the adjoining tract from the Company's scrip, namely, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ section 12, which were claimed by a homesteader named John W. Thurston; that in the hearing between Thurston and the Railway Company the testimony described the land of Mr. McPhee as being that on which the cabin was situated, but this fact was not observed by the Interior Department, and accordingly the Thurston land was held to be excepted from the railroad scrip and patent was issued to Thurston.

These facts were duly shown to the Interior Department by a petition for the exercise of supervisory authority, but such petition was denied on April 18th and July 10, 1916, respectively, on the ground that no explanation was given by McPhee for the long delay in filing the petition and showing the facts, also that he failed to file any protest against the allowance of Thurston's entry, final proof and the issuance of patent thereon. Thereupon we filed another [108] petition with the Interior Department, accompanied by affidavits showing that McPhee was not aware of the mistake or error, or of Thurston's fraud, until too late to protest against the latter's proof, and that his delay thereafter was caused by circumstances over which

he had no control. The Department denied this petition on July 10th, 1916, without discussion, except to state that "the petition failing to present any matter which it would appear has not heretofore been duly considered, it is proper to deny the same."

Your attention is respectfully invited to the fact that new matter *was* set up, namely, the excellent reasons existing for McPhee's delay, and his lack of knowledge of Thurston's use of the O'Donnell cabin, and securing issuance of patent thereon.

It therefore appears that fraud has been practiced on the Department by Thurston, and some of his witnesses, as the result of which he has secured United States patent for a tract of land to which he is not entitled, and the claim of the Railway Company thereto has been denied, and as a further result the right and the valid claim of Mr. McPhee to the land first above described have been likewise denied. It is earnestly submitted that these facts present proper reasons for the institution of a suit by your Department against the Thurston patent, to the end that that land may be patented to the St. Paul, Minneapolis and Manitoba Ry. Co., and to the end that the McPhee entry of the other tract may be reinstated, and McPhee allowed patent thereon. Otherwise gross fraud will have been perpetrated upon the Government, and an innocent man made to suffer.

The papers filed herewith, and made a part hereof, are copies of the Department's decisions of December 8, 1910, April 18, 1916, and July 10, 1916;

copy of petition for the exercise of supervisory authority; copy of letter of April 10, 1916; copy of affidavits filed with the Interior Department; and original affidavit of McPhee, dated October 5, 1916.

In conclusion your attention is invited to the fact that McPhee's action for rehearing of the first Departmental decision was pending before that Department for nearly four years, and thus [109] indicating that there was probably some doubt in the legal minds of the Department as to the decision which should be rendered.

With a prayer for your early and favorable consideration of this matter, I am

Very respectfully,
SAMUEL HERRICK,
Attorney for Albert R. McPhee.

Encl. [110]

October 25, 1916.

The Secretary of The Interior,
Sir:

I inclose herewith for your consideration and commendation a copy of a letter, dated October 17, 1916, addressed to the Attorney General by Samuel Herrick, Esq., attorney for Albert R. McPhee, and a copy of an affidavit executed by Mr. McPhee, October 5, 1916, in regard to his homestead claim to the W.1/2 of the NW.1/4 and NW.1/4 of the SW.1/4 in Section 12, T. 39 N., R. 6 E, in the State of Washington.

Mr. Herrick seems to feel that his client has been unjustly treated and has applied to this Department

for relief. I shall be glad to have your advice at as early a date as practicable.

Very respectfully,

For the Attorney General:

(Signed) ERNEST KNABEL,

Assistant Attorney General.

Inclo. 59861. [111]

DEPARTMENT OF THE INTERIOR,

WASHINGTON.

Nov. 17, 1916.

Dear Mr. Attorney General:

I am in receipt of your letter of October 25, 1916, enclosing a copy of a letter dated October 17, 1916, from Mr. Samuel Herrick of this city and a copy of an affidavit executed by Albert R. McPhee, dated October 5, 1916, relative to his former homestead claim (01723) for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington, land district, requesting advice in the premises. In response I have to report that on September 27, 1909, Elbert R. McPhee filed application 01723 to make a homestead entry for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E.

Attention is called to the fact that the homestead claimant in his original application papers signed his name as Elbert and in the subsequent papers as Albert R. McPhee.

On May 9, 1902, the St. Paul, Minneapolis and Manitoba Railway Company selected the above described tracts per list No. 44 under the same terms of the Act of August 5, 1892 (27 Stat., 390). The

plat of survey for these tracts was filed in the local office on February 6, 1907, and on February 23, 1907, the company conformed its list of selections to the public survey.

Said homestead application 01723 was rejected by the Register and Receiver upon the ground that the tracts in question had been selected by the said railway company as hereinbefore stated. McPhee filed an appeal to the General Land Office based on the ground that on August 29, 1909, he purchased the homestead right to these tracts from one Peter Beebe, who alleged settlement thereon August 16, 1906, and by decision "F" dated May 7, 1910, the decision of the local office was affirmed, subject to the usual right of appeal. On December 8, 1910, the case being before the Department on appeal by McPhee, the First Assistant Secretary affirmed the decision of the Commissioner of the General [112] Land Office of May 7, 1910.

On November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing of departmental decision of December 8, 1910, filed on behalf of McPhee and by Commissioner's letter of January 15, 1915, said departmental decision was promulgated and homestead application 01723 rejected.

On April 8, 1916, a motion was filed on behalf of McPhee for the exercise of supervisory authority of the department and on April 18, 1916, said petition was denied in a carefully considered decision of the First Assistant Secretary. On June 3, 1916, the resident attorney on behalf of McPhee filed in

this office a second petition for the exercise of supervisory authority of the Department in the matter of said homestead claim 01723, and on July 10, 1916, the First Assistant Secretary denied said petition and among other things said:

“The case, in its different aspects, has been before the Department at other times, and an examination of the record discloses that the decisions rendered sustaining the original action rejecting the application, and refusing to rescind said action, were fully justified and warranted under all the facts and circumstances appearing. The petition failing to present any matter which, it would appear has not been heretofore duly considered, it is proper to deny the same, and it is accordingly so ordered.”

On April 14, 1916, the record in the above entitled case was returned to the General Land Office and by Commissioner's letter “F” of July 31, 1916, the Department decision of July 10, 1916, was promulgated and the case closed.

The records also disclose that on February 6, 1907, John W. Thurston filed homestead application 01662 for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, T. 39 N., R. 6 E., and by Department decision of March 19, 1910, a hearing was ordered to determine the rights between Thurston and the Railway Company. As a result of the hearing the homestead application 01662 of John W. Thurston

was allowed August 22, 1911, upon which he submitted final proof September 28, 1912, final certificate issuing January 24, 1913, and [113] patent issued thereunder April 29, 1913. Thurston's application was sustained and allowed on the basis of the settlement claim or possessory right secured prior to and existing at the date of the railroad company's selection by one O'Donnell, with whom Thurston was shown to be in privity of estate or interest. The facts disclosed by the latter's final proof were further ascertained by means of a field investigation had by direction of the Commissioner of the General Land Office.

From the findings contained in the decisions of this Department above referred to, copies of which it is stated have been furnished you, I am of the opinion that no action looking toward the setting aside of a patent issued to Thurston should be taken.

Cordially yours,
(Signed) B. SWEENEY,
Assistant Secretary.

The Honorable, The Attorney General. [114]

EXHIBIT "A."

Glacier, Wn., Dec. 31, 1916.

Secretary of the Interior,
Washington, D. C.

Dear Sir:

I, Albert R. McPhee have made homestead entry on the W.1/2 of the NW.1/4, W.1/2 SW.1/4 of Section 12 Township 39 N. Range 6 East, Glacier, Wn.

This land was covered with railroad script and I claim prior rights to said land. Now I have been trying for the last five years to get a hearing against the railroad at our local land office in Seattle, Wn. finding it to be a hopeless case. I forwarded my affidavits to the General Land Office, Washington, D. C. From the look of things I guess my attorneys made it appear to you as though I was trying to get a rehearing. Now if you will look up the records in the local land office you will see that I have never had a hearing. And that I never have had a chance to meet the St. Paul M. & M. Railroad in court. Now I do not feel that I have had a fair chance in trying to win the homestead. I have made my home there and I feel that I ought to have a hearing anyway to give me some chance of trying to prove that I am in the right. I have made a home for myself and family here and I do not feel like giving up without trying to win anyway. Now I hope this letter will help you to understand a little of how I feel and that you will try and get me a hearing. Hoping I will hear from you at an early date, I am

Yours respec.,
ALBERT R. McPHEE. [115]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON.

January 16, 1917.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

Mr. Albert R. McPhee,
Glacier, Washington.

My Dear Sir:

In reply to your letter dated December 31, 1916, addressed to the Secretary of the Interior, you are informed that by letter "F," dated July 31, 1916, addressed to the local officers at Seattle, Washington, there was promulgated Departmental decision dated July 10, 1916, denying a second petition filed in your behalf for the exercise of the supervisory authority of the Department in the matter of your homestead application filed September 27, 1909, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E., Washington, which homestead application had been ordered rejected by previous Departmental decisions dated December 8, 1910, and November 18, 1914, for conflict with the selection of the railway company above named, under the act of August 5, 1892 (27 Stat., 39). The local officers were directed to notify you of the action therein taken, and notice was given directly by this office to Mr. Samuel Herrick of this city as your

attorney of record. It appears from the record in said case that your claim to the lands above described was very carefully considered, both in this office and in the Department, and there appears to be no relief which can be afforded to you, the record showing that the decisions rendered were fully justified and warranted under all the facts and circumstances set forth.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [116]

Exhibit "B."

Seattle, Wash., February 6, 1907.

I, John W. Thurston, of Maple Falls, Washington, applying to enter the following described non-mineral public land, to wit, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{3}{4}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, SE. ; Section 12, in Township 39 North of Range 6 East, do solemnly swear that since August 30th, 1890, I have not acquired title to, nor am I now claiming under any of the public land laws of the United States, other than the mineral land laws, an amount of land which, together with the lands above described, exceed in the aggregate 320 acres.

JOHN W. THURSTON.

Subscribed and sworn to before me this 6th day of February, 1907, at my office in Seattle, King County, in State of Washington.

J. HENRY SMITH,

Register. [117]

Land Office at Seattle, Wash.,
February 6, 1907.

I, John W. Thurston, of Maple Falls, Washington, do hereby apply to enter under Section 2289, Revised Statutes of the United States, the SE. $\frac{1}{4}$ SW., Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, in Township 39 North of Range 6 East, containing — acres.

JOHN W. THURSTON, [118]

AFFIDAVIT AS TO SETTLEMENT.

U. S. Land Office, Seattle, Wash.

I, John W. Thurston, having filed my homestead application, do solemnly swear that I have heretofore settled on the tract of land herein applied for, to wit: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, of Township 39 North, Range 6 East, that said application is made for the purpose of actual settlement and cultivation; that I am now residing on the land I desire to enter and that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced December 11, 1906; that my improvements consist of one story and a half house, 16x28, containing six rooms, a lean-to, 12x28 feet, chicken-house and cowshed, an acre cleared, and a half acre slashed, and that the value of the same is \$650.

JOHN W. THURSTON.

Subscribed and sworn to before me this 6th day of February, 1907.

J. HENRY SMITH,
Register. [119]

Seattle, Wash., February 27, 1907.

Mr. Edward M. Comyns,

Attorney for John W. Thurston,

Pacific Block, Seattle, Wash.

Dear Sir:

On February 6, 1907, you presented homestead application for SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., W. M., alleging to have made settlement upon the land applied for on December 11, 1906. The records of this office show that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, is embraced in list No. 44, selection made by the St. Paul, M. & M. Railway, and approved by this office on May 9th, 1902.

As the selection of said Railway Company was made more than four years prior to the time you claim to have settled upon the land your right to make entry therefor must be and is hereby rejected, subject to the usual right of appeal.

You will be allowed thirty days from the date hereof in which to appeal from the action of this office to the Hon. Commissioner of the General Land Office.

Very respectfully,

J. HENRY SMITH,

Register.

Personal service of copy of the foregoing accepted on above date.

C. M. COMYNS,

Attorney for John W. Thurston. [120]

Washington, D. C., July 23, 1909.

D.

To Register and Receiver,
Seattle, Wash.

Sirs:

The township plat was filed in the local office February 6, 1907, and on the same day the homestead applicant applied to make entry for said tract and made affidavit that he commenced settlement on the land December 11, 1906, and that his improvements thereon consist of a dwelling-house, 16x28 feet, containing six rooms, chicken-house and cowshed, one acre cleared and half an acre slashed, were of the value of \$650. His application was rejected February 7, 1907, subject to appeal for the reason that the records showed that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, were embraced in List 44, selection made by the said company, approved by your office May 9, 1902, under the act of August 5, 1892, 27 Stat. 390.

From that action Thurston appealed March 22, 1907, assigning as errors: 1. That you erred in rejecting his application for the above-described tract. 2. That failing to order a hearing to determine the relative rights of said Thurston and the St. Paul, M. & M. Ry. Co. was an error.

The tracts in conflict, viz., the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., while unsurveyed, were selected by the company per list No. 44, which was approved by the local office May 9, 1902, when the fees were paid, and on February 18, 1907, the company selected anew the same tract conform-

ing to the survey, which was approved February 23, 1907, by the local offices.

Thurston's application was filed February 6, 1907, the same day the township plat was filed in the local land office, and he alleged settlement December 11, 1906, after the land had been surveyed in the field.

The Company's right attached May 9, 1902, when its selection of the tract was made and the basis specified for the selection was valid; the claim of Thurston was not initiated until several years thereafter.

Your action in holding for the Company as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., is therefore affirmed, subject to the right of further appeal by Mr. Thurston. You will notify him of this action and report promptly at the expiration of his appeal period.

The Company will be advised by this office.

Very respectfully,

_____,
Acting Assistant Commissioner. [121]

DEPARTMENT OF THE INTERIOR.

BEFORE THE HONORABLE SECRETARY.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

APPEAL.

Comes now John W. Thurston, by his attorney Edward M. Comyns, and appeals to the Hon. Sec-

retary of the Interior from the decision of the Hon. Commissioner of the General Land Office, dated July 23, 1909, sustaining the decision of the United States District Land Office at Seattle, Washington, adverse to this applicant, and in support of said appeal alleges error in affirming the decision of the Hon. Commissioner of the General Land Office, sustaining the action of the local office, in rejecting the homestead application of John W. Thurston for the above-described land.

E. M. COMYNS,
Attorney for Appellant. [122]

In the Matter of the Rejection of the Homestead Application of JOHN W. THURSTON for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 North, Range 6 East.

NOTICE OF APPEAL.

To the Hon. Register and Receiver of the United States Land Office, Seattle, Washington:

You and each of you will please take notice that the above-named homestead applicant, John W. Thurston, appeals to the Hon. Commissioner of the General Land Office from your decision of February 27th, 1907, rejecting the above-described homestead application.

E. M. COMYNS,
Attorney for John W. Thurston.

STATEMENT OF CASE.

On May 9, 1902, List No. 44, embracing the E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39

N., Range 6 E., was presented by the St. Paul, M. & M. Ry. Co.

On February 6, 1907, the date of the filing of the plat of said township, homestead application for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 North, Range 6 East, was presented by John W. Thurston and settlement thereof alleged December 11, 1906.

On February 27, 1906, the Hon. Register and Receiver of the local land office rejected the said application of John W. Thurston. From this decision the homestead applicant has now appealed.

SPECIFICATIONS OF ERROR.

I.

The Hon. Register and Receiver erred in rejecting the homestead application of John W. Thurston for the above-described land.

II.

The Hon. Register and Receiver erred in failing to order a hearing to determine the relative rights of said John W. Thurston and the St. Paul, M. & M. Ry. Co.

Respectfully submitted,

E. M. COMYNS,

Atty. for Appellant. [123]

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE.

Seattle, Wash.

In the Matter of List No. 4, St. Paul, M. & M. Ry.
Co., Embracing the E. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$
SW. $\frac{1}{4}$, Section 12, Township 39 N., Range
6 E.

PROTEST.

Comes now John W. Thurston, by his attorney Edward M. Comyns, and protests against the certification of the above numbered list of the above named railway company, and the passing to patent of the land embraced therein, in so far as it includes the above described land, and asks that a hearing be ordered at which he may be permitted to establish the fact that the above described land was not on the date of its selection subject thereto, and in support of said protest and request submits the attached affidavit.

E. M. COMYNS,
Attorney for John W. Thurston.

State of Washington,
County of Whatcom,—

John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my postoffice address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and

made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906, said Daniel O'Donnell during all the said period being qualified to make homestead entry and occupying land with a view to make said entry. In October 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. I took up my residence on the land in December 1906 and have lived there continuously ever since, and the improvements placed by me on said land are to-day reasonably worth the sum of \$2,000. I was at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., Range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, the land [124] above described was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection.

JOHN W. THURSTON.

Subscribed and sworn to before me this 29th day of September, 1909.

H. J. STUCKFADEN,
Notary Public in and for the State of Washington,
Residing at —

State of Washington,
County of Whatcom,—ss.

Herman Steiner and H. E. Leavitt, being first duly sworn, depose and say that they have read the foregoing affidavit of John W. Thurston; that they are of their own knowledge familiar with the facts set forth and know the same to be true.

HERMAN STEINER.

H. E. LEAVITT.

Subscribed and sworn to before me this — day
of September 1909.

H. J. STUCKFADEN,

Notary Public in and for the State of Washington,
Residing at — [125]

GENERAL LAND OFFICE,
WASHINGTON.

April 1, 1910.

Register and Receiver,
Seattle, Wash.

Sirs:

I enclose a copy of departmental decision in above entitled case, dated March 19, 1910, which affirms as modified office decision of July 23, 1909.

The appeal to the department was accompanied by the affidavit of Thurston, corroborated by two witnesses, in which it was alleged that the land was settled upon in 1901, by Alfred Small, who built a cabin thereon and made other improvements, occupying and residing on the land until March 1902,

when he transferred his improvements and claim to Daniel O'Donnell, a qualified entryman, who immediately took possession of the land and resided there continuously until the fall of 1906; that in October 1906, O'Donnell conveyed all his right to the same to Thurston, who has lived there continuously and placed on the premises improvements of the value of \$2,000; that he was there at all times up to February 6, 1907, when the plat was filed, entirely ignorant of the fact that the St. Paul, Minneapolis and Manitoba Railway Company was laying any claim to this land. That on May 9, 1902, the date of the filing of the selection by said company said land was actually occupied and improved.

The action of this office of July 23, 1909, on the record presented was approved, but the department holds, from the allegations contained in the affidavit accompanying the appeal, that the appellant was entitled to a hearing, in order that he may be afforded an opportunity of proving the allegations made by him; because, if as a matter of fact, the land was occupied by a qualified settler at the date of the company's selection, such land was not subject to selection (37 L. D. 193, 502 and 578).

You will therefore appoint a day for a hearing, with notice to the parties in interest to appear with their witnesses, to prove the status of the land on May 9, 1902, the date of the Company's selection.

Very respectfully,

JOHN McPHAIL,

Acting Assistant Commissioner. [126]

(Copy.)

Letter from Department of the Interior
to
Commissioner of the General Land Office.

March 19, 1910.
16855.

Sir:—

This is the appeal of John W. Thurston from your office decision of July 23, 1909, affirming the action of the local office rejecting his homestead application for the SE. quarter of SW. quarter sec. 1, E. half of NW. quarter, NE. quarter of SW. quarter Sec. 12, T. 39 N. R. 6 E, Seattle, Washington, land district.

It appears from the record and your said decision that the plat of the township in which this land is situated was filed in the local office February 6, 1907, on which day Thurston presented his homestead application for the tract above described, alleging that he had commenced settlement on the land December 11, 1906 with improvements consisting of a dwelling house 16 by 28 feet, six rooms, chicken house, cowshed one acre cleared and half an acre slashed, the value of the improvements being \$650. This application was rejected February 27, 1907 by the local office for the reason that the E. half of the NW. quarter and the NE. quarter of the SW. quarter was embraced in list No. 44 of selections made by the St. Paul, Minneapolis and Manitoba

Railway Co., filed May 9, 1902, under the provisions of the act of Aug. 5, 1892. (27 Stat. 390).

In appealing from the action of the local office, appellant alleged that the register and receiver erred in failing to order a hearing to determine the relative rights of Thurston and for the railway company and upon the record thus made your office correctly affirmed the action of the register and receiver.

However, accompanying the appeal to the Department is the affidavit of Thurston, corroborated by two witnesses, in which it is alleged that he has been acquainted with the land involved for the past ten years; that it was first settled upon within his knowledge in the year of 1901 by Alfred Small, who built a cabin thereon and made other small improvements in the way of clearing, making trails, etc. and he resided on and occupied the land until March 1902 when he transferred his improvements and claim to Daniel O'Donnell who immediately upon acquiring possession commenced his residence on the land and continued to occupy it until the fall of 1906 when he conveyed all his right and title to the land, together with all the improvements thereon to appellant; that during the period of his occupancy of the land Daniel O'Donnell was qualified to make homestead entry and occupied the land with a view of making such entry; that appellant established his residence on the land in December 1906, since which time he has lived there continuously, the improvements on the land at the present date being worth the sum of \$2,000 and he was at all times up to

February 6, 1907, the day of the filing of the plat of the township in the local office, entirely ignorant of the fact that the railway company was claiming the land in any way; that on May 9, 1902, the date of the filing of the company's selection, the land was actually occupied and improved and such occupancy and improvements were readily discernible by the most casual inspection.

While the action of your office, as above stated, was correct upon the record as presented, it would seem from the allegations contained in the affidavit accompanying the appeal, that the appellant is entitled to a hearing in order that he may be afforded an opportunity of proving the allegations made by him; because, if, as a matter of fact, the land was occupied by a qualified settler at the date of the Company's selection, such land was not subject to selection. 37 LD. 193, 502 and 576.

As thus modified the action of your office is affirmed and the papers are returned herewith with instructions to proceed as indicated herein.

FRANK PIERCE,

First Assistant Secretary. [127]

ARGUMENT.

We respectfully request the Hon. Secretary of the Interior in determining this appeal to consider *that* the protest against the certification of the lieu selection by the St. Paul, M. & M. Ry. Co., filed in the local land office by appellant herein, a copy of which is hereto attached.

Under the act of August 5, 1892, the lands subject to selection by the company are restricted to the

non-mineral lands not reserved, and to which no adverse right or claim shall have attached, or been initiated at the time of the making of such selection.

The affidavit filed in support of said protest shows *prima facie* a claim adverse to that of the company antedating its selection and existing at the time of the making of such selection.

While such *prima facie* showing indicates the fact of continuous occupation and improvement of the land by persons qualified to make homestead entry from a period long prior to the making of the selection by the company up to the present time we submit that such continuous occupation would not be required in order to defeat the claims of the company under its selection.

In order to ascertain whether a tract of land is susceptible to acquisition under act of August 5, 1892, its status at the time of the making of the selection must govern. If an adverse right or claim had been attached or been initiated at the time of the making of the selection, a subsequent *in the* change of the status of the land could not operate to revive the company's right under its selection. The opinion of the Hon. Secretary in case of Kern Oil Company et al. vs. Clark, is applicable to this case:—

“Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands, who were there at the invitation or by

the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public land legislation where, in providing a new mode of disposing of public land, Congress has been careful to avoid contest between individuals and to prevent claimants under the new law from disturbing the possessory rights or imperfect claims of others. (XXXI L.D. 295.)

We submit that appellant is entitled to a hearing at which he may be permitted to establish the fact that an adverse claim had attached to this land, and was existing on the date of the company's selection thereof, and to this end pray that the decision of the Hon. Commissioner be reversed and set aside.

Respectfully submitted,
E. M. COMYNS,
Attorney for Appellant. [128]

UNITED STATES LAND OFFICE.

Seattle, Washington, April 12, 1910.

Contest 101.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO. (Now GREAT NORTH-
ERN RY. CO.)

INVOLVING: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T.39 N.,
R. 6 E., W. M. (Seattle Serial
O1662).

To the Parties Above-named:

The plat of the township including the above de-

scribed lands was filed in this office February 6, 1907, on which day John W. Thurston above named filed homestead application for said lands, alleging that he had commenced settlement on the lands December 11, 1906, with improvements consisting of a dwelling house 16 by 28 feet, six rooms, chicken house, cowshed, one acre cleared and half an acre slashed, the value of the improvements being \$650. This application was rejected February 27, 1907, by this office for the reason that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 12, in said township and range, was embraced in list No. 44 of selections made by the St. Paul, Minneapolis & Manitoba Railway Company, filed May 9, 1902, under the provisions of the act of August 5, 1892 (27 Stat., 390). From this rejection, said Thurston appealed to the Honorable Commissioner of the General Land Office, and from the decision of said Honorable Commissioner affirming said rejection by this office, said Thurston appealed to the Honorable the Secretary of the Interior, and accompanied the latter appeal with his affidavit, corroborated by two witnesses, which contains an allegation to the effect that the lands in question were occupied by a qualified settler at the date of the company's selection.

The Department holds that, from the allegations contained in the affidavit above referred to, the appellant is entitled to a hearing, in order that he may be afforded an opportunity of proving such allegations. By letter "F" CSB dated April 1, 1910, the Honorable Commissioner of the General Land Office promulgates said decision of the Department,

dated March 19, 1910, and directs that this office "appoint a day for a hearing, with notice to the parties in interest to appear, with their witnesses, to prove the status of the land on [129] May 9, 1902, the date of the company's selection."

You are hereby notified that such hearing will be had before the register and receiver of this office on the 24th day of May, 1910, at 10 o'clock A. M., at which time you are cited to appear and present evidence, if any you have, showing the status of the lands in question on May 9, 1902.

J. HENRY SMITH,
Register.

Registered to E. M. COMYNS,
Atty. for Thurston,
And to GREAT NOR. RY. CO. [130]

UNITED STATES LAND OFFICE,
Seattle, Washington.

CONTEST No. 101.

Involving: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ Sec. 12, Tp. 39 N., R. 6 E.
Seattle Serial 01662.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO.

DECISION.

The plat of the survey of fractional township 39 North, Range 6 East, embracing the land above described, was filed in this office on the 6th day of

February, 1907, at the hour of 9:00 o'clock A. M. At the time of the filing of said plat, to wit: February 6th, 1907, at 9:00 o'clock A. M., John W. Thurston filed a homestead application for said above described lands, and in connection with his said application alleged settlement thereon on December 12th, 1906, and that he had continued to reside thereon ever since the date of his said settlement. Prior to the filing of said plat, to wit, on the 9th day of May, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed its list of selections, No. 44, embracing all of the lands above described. On February 27th, 1907, this office rejected the said homestead application on account of the said selection of said Railway Company having been made prior to the date of the alleged settlement of said homestead applicant, from which said rejection said homestead applicant appealed to the Honorable Commissioner of the General Land Office, who by letter "F" of July 23d, 1909, affirmed our action and rejected said homestead application. Said homestead applicant having further appealed to the Department of the Interior, with his letter "F" of April 1st, 1910, the Hon. Commissioner of the General Land Office transmitted a copy of the Departmental decision of March 19th, 1910, wherein the Department [131] recites and holds as follows:

"In appealing from the action of the local office appellant alleges that the Register and Receiver erred in failing to order a hearing to determine the relative rights of Thurston and

the Railway Company, and upon the record thus made your office correctly affirmed the action of the Register and Receiver.

“However, accompanying the appeal to the Department is the affidavit of Thurston, corroborated by two witnesses, in which it is alleged that he has been acquainted with the land involved for the past ten years; that it was first settled upon within his knowledge in the year 1901 by Alfred Small, who built a cabin thereon and made other small improvements in the way of clearing, making trails, etc., and who resided on and occupied the land until March 1902, when he transferred his improvements and claim to Daniel O'Donnell, who immediately upon acquiring possession commenced his residence on the land and continued to occupy it until the fall of 1906, when he conveyed all of his right and title to the land, together with the improvements thereon, to appellant; that during the period of his occupancy of the land Daniel O'Donnell was qualified to make homestead entry, and occupied the land with the view of making such entry. That appellant established his residence on the land in December, 1906, since which time he has lived there continually—the improvements on the land at the present date being worth the sum of \$2,000; that he was at all times up to February 6th, 1907, the day of the filing of the plat of the township in the local office, entirely ignorant of the fact that the Railway Company was claiming the land

in any way; that on May 9th, 1902, the date of the filing of the Company's selection, the land was actually occupied and improved, and such occupancy and improvements were readily discernible by the most casual inspection.

"While the action of your office as above stated was correct upon the record as made it would seem from the allegations contained in the affidavit accompanying the appeal, that the appellant is entitled to a hearing in order that he may be afforded an opportunity of proving the allegations made by him; because if as a matter of fact the land was occupied by a qualified settler at the date of the Company's selection such land was not subject to selection."

The Hon. Commissioner of the General Land Office in his said letter "F" of April 1st, 1910, instructed this office as follows:

"You will therefore appoint a day for a hearing with notice to the parties in interest to appear, with their witnesses to prove the status of the land upon May 9th, 1902, the date of the Company's selection."

In pursuance of said instructions on April 12th, 1910, a hearing was ordered to be had before the Register and Receiver of this office on the 24th day of May, 1910, at the [132] hour of 10:00 o'clock A. M., notice of which said hearing was duly served by registered mail on Thomas R. Benton, attorney for the said Railway Company, and on Edward M. Comyns, attorney for said homestead applicant. At the time set for said hearing, to wit, May 24th,

1910, at 10:00 o'clock A. M., the said homestead applicant appeared in person, together with his said attorney, Edward M. Comyns, the said St. Paul, Minneapolis & Manitoba Railway Company failing in all ways to appear, whereupon, on motion of counsel for said Thurston, a default was entered against said Railway Company; whereupon said homestead applicant introduced the testimony of sundry witnesses in support of his claim to the land as shown by the record of the Contest Clerk filed herein, from which said evidence it fully and satisfactorily appears that on May 9th, 1902, the land in controversy was occupied by a qualified settler, at the date of the Company's selection. We therefore find and decide that the aforesaid selection of said Railway Company of the lands above described should be cancelled, and that the homestead application of the said John W. Thurston for the land in question should be allowed, and we so recommend.

Dated at Seattle, Washington, this 24th day of May, 1910.

J. HENRY SMITH,
Register.

T. R. TWITCHELL,
Receiver. [133]

THE DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

Seattle, Washington.

CONTEST No. 101.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY.

Involving: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1; E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E. Seattle,
Serial No. 01662.

Now on this 24th day of May, 1910, at the hour of 10:00 o'clock A. M., being the time set for the hearing of the above-entitled case, as authorized by the Honorable Commissioner's letter "F" of April 1st, 1910, the homestead applicant, John W. Thurston, appearing in person and by his attorney, Edward M. Comyns, the St. Paul, Minneapolis & Manitoba Railway Company, lieu selector, not appearing, and it appearing from the evidence on file in this case that the said Railway Company has been duly and regularly served by registered mail of the time and the place of this hearing, on motion of counsel for said homestead applicant,

IT IS HEREBY ORDERED that a default be, and the same is hereby, entered against the said St. Paul, Minneapolis & Manitoba Railway Company, whereupon, on application of counsel for said homestead applicant, the following proceedings were had

and evidence introduced for and on behalf of the said John W. Thurston;

All of said witnesses, after being first cautioned with regard to their testimony, were duly sworn by the Register to testify to the truth, the whole truth and nothing but the truth in the above case.

JOHN R. SMITH, a witness called in behalf of the homestead applicant, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. State your full name, Mr. Smith.

A. John R. or John Robert Smith.

Q. Where do you reside, Mr. Smith?

A. At Sumas, Whatcom County, this state.

[134]

Q. What has been your occupation, Mr. Smith?

A. I have been employed in the Forest Service Department as a ranger.

Q. And for what length of time?

A. Since 1900 up to the first of this year in March.

Q. From 1900 to March, 1910? A. Yes, sir.

Q. In what district?

A. I was in the Mt. Baker District.

Q. Does that embrace any portion of Township 39 North, Range 6 East?

A. It did at that time but it doesn't at the present time.

Q. And what period was this that embraced any

portion of Township 39 North, Range 6 East in the Forest Reserve? A. In 1903.

Q. Were you acquainted with the North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12, Township 39 North, Range 6 East?

A. Yes, sir, I have been over the ground several times.

Q. And when were you first there, Mr. Smith?

A. I was first there in 1901.

Q. In 1901? A. Yes, sir.

Q. And do you recollect what part of the year?

A. It was in the summer of 1901.

Q. You stated that you were on the land in 1901?

A. Yes, sir.

Q. Do you recall about the time of the year?

A. In the summer season, I should judge about June.

Q. What was the condition of the land at that time relative to improvements or lack of them?

A. I saw no improvements.

Q. None at all? [135]

A. No, sir.

Q. When were you next on the land, Mr. Smith?

A. In the spring of 1902.

Q. Was it prior to May 9th, 1902, or subsequent to that? A. It was prior; it was in March.

Q. In March, 1902? A. Yes.

Q. And what did you find there in the way of improvements on that date?

A. I saw a cabin; that is, a part of a cabin; just the body, some logs put together.

Q. And upon what particular forty acre tract was that cabin?

A. The northeast of the northwest, I think. I ain't sure about it.

Q. And was there anything else in the way of improvements that you saw at that time?

A. Some slashing had been done and some logs cut in front and piled up in a little pile.

Q. Did it bear evidence of having been recently placed there, or did it appear to have been there a long while?

A. It appeared to be new at that time.

Q. And was it a cabin in course of construction?

A. It was a cabin in course of construction; a log cabin.

Q. Did you ascertain whose cabin it was, or who was doing the work?

A. I understood at the time who it was. There was no one present at that time.

Q. When were you there again after March, 1902?

A. Well, I was there the same month, in March, 1902; I was there later and about the first of April.

Q. And did you notice any difference in the improvements? A. Yes, sir.

Q. What difference did you note?

A. The cabin was completed.

Q. The cabin was completed? [136]

A. Yes, sir.

By the REGISTER.—In 1902? A. Yes, sir.

Mr. COMYNS.—The latter part of March 1902.

Q. What did it consist of?

A. Cooking utensils, coffeepot and frying-pan and a small stove and small articles of cooking utensils, and some tools there for working; a mattock and axe, etc.

Q. Do you know who had constructed the cabin or to whom it belonged?

A. There was a notice posted on the door of the cabin.

Q. Do you recall what that notice contained?

A. It contained a description of the land and the time it was settled, but I don't remember the description particularly or the date of settling.

Q. And how was it signed? Who was it signed by? A. By Jack Thurston, or John Thurston.

Q. Now, I will ask you whether there was any trails leading in to the land?

A. There was a trail.

Q. Was that the only trail that gave access to this tract?

A. It was to this particular part of the tract; yes, the only trail.

Q. Not to anyone coming in on that trail would these improvements be readily visible?

A. They would.

Q. It would be impossible to miss them, would it, if a person came in over that trail?

A. No, you couldn't miss them; you couldn't pass them on that trail; no.

Q. When were you there next after March, 1902?

A. I was there in 1903.

Q. And were the same improvements existant at that time? [137]

A. Oh, yes. I will tell you. I have got some things mixed here now; it has been so long ago. What name did I say was on it?

Mr. COMYNS.—Thurston.

WITNESS.—It was O'Donnell. Not Thurston then.

By the REGISTER.—Do you wish to correct your testimony in relation to the notice? Do you wish to correct it? A. Yes, sir.

By the REGISTER.—You may do so.

A. The name was Dan O'Donnell, Mr. Thurston coming in afterwards. I have got them mixed up, being so long ago.

Q. You were there then in the month of March, 1902, twice?

A. Yes, I went up there about the latter part of March.

Q. Then again in 1903? A. Yes, sir.

Q. And you saw the cabin in the latter part of March, and also in 1903? A. Yes, sir.

Q. How was it furnished in 1903?

A. Nothing seemed to be removed. There was everything there.

Q. Did it bear evidence of being occupied?

A. Yes.

Q. I will ask you then if this land was vacant, unoccupied land in any sense in May, 1902?

A. It was; so far as my knowledge went there were no other claimants.

Q. But it was claimed in the month of May, 1902? A. Yes, yes. Nothing prior to that time.

Q. What would you say would be a reasonable value to put upon such improvements as you saw there? A. This cabin?

Q. Yes, and such clearing as there was?

A. Not a great deal. I would say \$150, not taking into consideration the trail.

Witness excused. [138]

ALFRED SMALL was next called as a witness, and being first duly sworn, testified as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside. A. At Wickersham.

Q. And what's your business? A. Logger.

Q. Are you acquainted with the tract now embraced in the homestead of John W. Thurston in Section 12? A. Yes, sir.

Q. How long have you been acquainted with that tract of land?

A. Since the latter part of August, 1901.

Q. What was its condition on that date?

A. It was wild.

Q. It was wild? A. Yes, sir.

Q. When did you again visit it after August, 1901?

A. I was there for about eight or nine days straight that time working.

Q. In the latter part of August? A. Yes, sir.

Q. What were you doing there?

A. Building a trail and making preparations for building a cabin.

Q. For what purpose was you building the trail and doing the work you have just stated?

A. I was hired to do it.

Q. By whom? A. C. C. Cole.

Q. Did you do any other work in the fall of 1901?

A. I laid the cabin up about three logs high.

Q. When were you there again?

A. I was there on or about the 20th of November the same year.

Q. And what did you do on that occasion? [139]

A. I went up there to work for Mr. O'Donnell.

Q. Did you do any work on the place at that time?

A. Not at that time.

Q. When did you again do any work, if at all?

A. The last work I done on the claim was along about the 12th of October.

Q. The same year? A. The same year.

Q. What other work did you do then?

A. I laid up one more log and took my tools down off the claim.

Q. And when were you again on the claim?

A. The last time was in February, 1902; along about February.

Q. February 1903 or 2? A. 1902.

Q. And did you do any work then?

A. No, sir; the cabin was completed.

Q. Did you see anyone complete the cabin?

A. I didn't see anyone complete the cabin.

Q. That was the same cabin you started in the fall of 1901? A. Yes, sir.

Q. Describe its size and construction as it was completed?

A. It was made out of split logs and was standard requirements, size 14x15; the logs were split and were about 18x24 on the butts and dovetailed together; then the sides were made out of split shakes and the roof was made out of split shakes.

Q. Were there any doors or windows in it?

A. Yes, sir.

A. Yes, sir, there were doors and windows in it.

Q. Was that a comfortable cabin as it existed in March, 1902? A. Yes, sir.

Q. Was it furnished at that time?

A. It was furnished very comfortably for a home-stead.

Q. And who was occupying the cabin at that time?
[140]

A. Dan O'Donnell.

Q. Was there anything else in the way of improvements in the month of March, 1902, except this cabin?

A. There had been trees slashed away, trees that were in danger of falling on the cabin.

Q. And they would cover what area?

A. I should judge about one-half of an acre.

Q. Was there anything additional in the way of trail work? A. Yes, sir.

Q. Was there a trail leading to the cabin?

A. Yes, sir, leading to the cabin from the County Road.

Q. When were you there again, Mr. Small, if at all? A. Along in July right after the Fourth.

Q. That was in July, 1902? A. In July, 1902.

Q. Who was occupying the cabin then, if anyone.

A. O'Donnell.

Q. And what was its condition? A. Habitable.

Q. Did the cabin bear evidence of continuous occupation between March and July, 1902?

A. Yes, sir, it bore such evidence.

Q. You say you were employed by Mr. Cole?

A. Yes, sir.

Q. To build the cabin? A. Yes, sir.

Q. But Mr. Cole never occupied the cabin?

A. No, sir; he never did.

Q. How did Mr. O'Donnell secure possession of it, do you know?

A. He bought the improvements Mr. Cole had done.

Q. Bought them during the course of construction? A. Yes, sir.

Q. Do you know what he paid Mr. Cole?

A. As near as I can remember, one hundred dollars. [141]

(By the REGISTER.)

Q. Do you claim to be a settler on the land at that time, in 1901?

A. No, sir; I was not a settler. I was working there for another man.

Q. Who was the party for whom you made the improvements? A. C. C. Cole.

Q. Cole was then the first settler on the land?

A. Cole was the original locator.

Q. And at what time did he make his settlement?

A. He made his settlement as near as I can remember in July, 1901.

Q. Did he established a residence at that time?

A. He established a residence, but he lived on the section line north of there; he didn't live in that cabin.

Q. Did he claim other lands in another section north? A. No; no other lands.

Q. Was his residence on the section line north made with the intention of retaining this land?

A. Yes, sir.

Q. And did he at that time suppose himself to be on this particular tract when he made his residence there?

A. He was just stopping there while I was doing this work for him—building this cabin; just a stopping place.

Q. Did he ever establish a residence in this cabin you built on this tract?

A. No, sir, he transferred the work I done to O'Donnell before it was completed.

Q. Did he intend to be a settler? A. Yes, sir.

Q. He made these improvements for himself intending to become a settler?

A. Yes, sir, for himself.

Q. Was it his intention to take the land as a homestead? A. Yes, sir.

Q. And it was for that purpose these improvements and settlement [142] and work was done?

A. Yes, sir.

Q. With a view to making a settlement on the land? A. Yes, sir; a settlement.

Q. What was his occupation?

A. He was a teamster, driving team; and he had contracted to haul shingle bolts for a man down—I forget the name of the man he was working for.

Q. And what was the date he made the sale to O'Donnell? About what time?

A. It was some time in the latter part of August or first of September, 1901.

Q. 1901? A. 1901; yes.

Q. Do you know anything about whether O'Donnell took possession of the improvements at the time of that transfer? A. Yes, sir, he took possession.

Q. Did he establish a residence on the land?

A. Yes, sir, he made it his stopping place.

Q. And how long did he live there?

A. I do not know.

Q. Do you know anything about the transfer from him to somebody else—from O'Donnell to some other person?

A. I know there was a transfer made to someone, but the circumstances I don't know nothing about at all.

Q. Do you know when the present claimant took possession of the improvements?

A. I don't know the exact date but I know the year.

Q. What year? A. 1906.

Witness excused. [143]

HERMAN STEINER, being next called as a witness on behalf of claimant, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside, Mr. Steiner?

A. At Maple Falls.

Q. What is your occupation? A. Farmer.

Q. Are you acquainted with that tract of land embraced in the homestead application of Mr. John Thurston located in Section 12, Township 39 North, Range 6 East? A. Yes, sir.

Q. How long have you been acquainted with that tract of land?

A. I have known it for about fifteen years.

Q. Were you on that land prior to May, 1902?

A. Yes, sir.

Q. Upon what date immediately prior to that date were you on the land?

A. I was there in the fall of 1901, and early in the spring of 1902, February or March.

Q. What was the condition of the land in 1901 when you visited it?

A. There was a log cabin started.

Q. And when were you there in 1902?

A. Either February or March; I don't remember which.

Q. What was the condition of the land at the time you visited it at that time?

A. There was a cabin built on the land.

Q. What kind of a cabin was this?

A. A log cabin, I should judge 14x16, the size of it.

Q. Built of cedar logs? A. Yes.

Q. Was it furnished to any extent?

A. Yes, sir, a good stove in it, cooking utensils and a bed. [144]

Q. Was anyone occupying it? A. Yes, sir.

Q. Who? A. O'Donnell; Dan O'Donnell.

Q. What was the occasion of your presence up there in February or March, 1902?

A. I helped to build the cabin.

Q. Did you do any other work around the place?

A. I done a little clearing around.

Q. What was the extent of that clearing or slashing, in 1902?

A. I think about a quarter of an acre; something like that.

Q. And directly upon the completion of the cabin was it furnished by Mr. O'Donnell? A. Yes, sir.

Q. Did you help furnish it, or do anything in that line?

A. Yes, I helped pack a cook-stove up there.

Q. Was there anything in the way of trail work in March, 1902? A. Yes, the trail was built.

Q. When were you there again?

A. About a year later.

Q. Were the same improvements on the land?

A. Yes, sir.

Q. Did Mr. O'Donnell still occupy the cabin?

A. I suppose so. I didn't go in the cabin. I

seen the cabin from a distance, but I didn't go in there.

Q. Did you take note of any notices posted on the cabin or on the land when you were there in March?

A. Yes, there was a notice on the cabin door.

Q. Do you remember the contents of that notice with reference to the possession of the land?

A. That he had taken land in Section 12 as a homestead, as near as I can remember it, giving the description of the land.

Q. What did the notice contain? [145]

A. Why that he as a citizen of the United States claimed this as a homestead.

Q. Who was it signed by?

A. O'Donnell and I was a witness.

Q. Do you know who wrote that notice?

A. I and him wrote it out together.

Q. How close to the cabin were you in 1903?

A. Why I was in about 100 feet of it, or 150 feet.

Q. Did it bear evidence of having been abandoned since you saw it in March?

A. No, it didn't look like it was abandoned.

Q. Did you come along this trail that led to his cabin, did you pursue that trail in going up there in the year afterwards, in 1903? A. In 1903?

Q. Yes?

A. No, I came down through the brush. I didn't follow the trail.

Q. What would be a reasonable value to put upon such improvements as were there in March, 1902, when you left the place? A. About \$150, I think.

Witness excused.

DAN O'DONNELL, being next called as a witness in behalf of the claimant, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside, Mr. O'Donnell?

A. At Lawrence at present.

Q. And what's your business?

A. Working in the logging camps.

Q. Where did you reside in 1901?

A. At Maple Falls. I had charge of a mine.

Q. Are you acquainted with the North half of the Northwest quarter, the Southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 12, township 39 north range 6 east? [146] A. Yes, sir.

Q. When were you first on that land, Mr. O'Donnell? A. When did I first go on there?

Q. Yes?

A. Near about—I can't give the exact date,—but it was in August either the last or near about the first of September, 1901.

Q. 1901? A. Yes, sir.

Q. And what was the occasion of your presence on that land, how did you come to be there?

A. I was looking for a homestead and I happened up that way.

Q. Just go on and state how you acquired that homestead, if you did acquire it?

A. It was through my father that I was informed

a squatter wanted to sell his right, as you would call it, I suppose.

Q. What was the name of the squatter?

A. Why Mr. Cole was the name. So, I went up to see him, and I looked the claim over and I paid him one hundred dollars for the location fees. He had a trail in there and had started a cabin.

Q. And what did you do then?

A. Why I started to work on the cabin. I was back and forth; every little spare time I could get I would go out there and do a little work. Of course, it was a little inconvenient to get in there, but I worked on the place the best I could.

Q. When was the cabin completed?

A. Near about in March, as near as I can judge, 1902.

Q. And did you furnish it?

A. I bought a little supplies and took in there; a stove and stuff I bought at Maple Falls; a bachelor's outfit.

Q. Did you post any notices indicating what land was claimed by you? A. Yes, sir. [147]

Q. And was that the same land I described to you? A. Yes, sir.

Q. Were you occupying that land in the month of May, 1902? A. Yes, sir.

Q. On May 9th, 1902? A. Yes, sir.

Q. The date the St. Paul, Minneapolis & Manitoba attempted this selection?

A. Yes, sir. I was on there before they ever selected. I was right on the trail between the hills there.

Q. Then your claim had attached in May, 1902?

A. Yes, sir.

Q. And the land was in no sense unoccupied land on that date? A. Yes, sir.

Q. Was there anyone else claiming it outside of yourself? A. No, sir.

Q. Were there any cabins on any of the other forties claimed by you?

A. No, sir, I was all over the land. Me and other parties that appeared there.

Q. What was the value of the improvements that were there on that land on the 9th day of May, 1902?

A. Well, do you mean what it cost me for what I had in the cabin and all?

Q. Yes, put it all together, figuring your own labor and the labor of anyone that helped you?

A. \$150 for the cabin.

Q. And it had cost you that up to May, 1902?

A. Yes, sir.

Q. Now, you did some trail work there, didn't you? A. Yes.

Q. Were these improvements readily discernible to anyone making an examination of this claim?

A. Yes. [148]

Q. And was this trail that led up to your cabin the only trail on your land? A. The only one.

Q. Was that the only one in May, 1902?

A. Yes, sir.

Q. When, if at all, did you convey these improvements to anyone else? A. I don't—

Q. When did you convey your improvements to

anyone else, if you did so convey them? When did you sell your improvements to anyone?

A. I didn't sell my improvements.

Q. Subsequently did you not sell out?

A. No.

Q. Why, isn't it a fact that your turned over your improvements to Mr. Thurston?

A. But that was later.

Q. That is what I am speaking of, later; I don't mean at that time? A. Sure.

Q. What time was that; what time did Mr. Thurston take possession?

A. I would judge it would be—I can't exactly state.

Q. Well, it was several years later than 1902?

A. Yes, several years afterwards. It was along in the Spring, I judge, about a year or two later.

Witness excused.

HERBERT E. LEAVITT, a witness called in behalf of the homestead applicant, being first duly sworn by the Register to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Q. Where do you reside, Mr. Leavitt?

A. At Maple Falls.

Q. What is your occupation?

A. Blacksmith and rancher. [149]

Q. Are you acquainted with the tract of land as embraced in Mr. Thurston's homestead application?

A. Somewhat; yes.

Q. When were you on that land, if at all?

A. I have been on it twice. I was on it in 1901 and 1902.

Q. About what part of the year 1901 were you on it?

A. In October about the 26th or 7th; somewhere along there.

Q. And what was the condition of that land at that time?

A. Somebody had started a foundation for a cabin in there, that I saw when I came through there.

Q. And about what time in 1902 were you on it?

A. That was just shortly after I sold out the hotel there. I went up there on a little hunting excursion and I camped there on the 9th of May.

Q. Then you went in there on the 9th of May and came out the 10th? Camped there the night of the 9th? A. Yes, sir.

Q. How do you fix that date, Mr. Leavitt?

A. It was just after I sold my hotel, my business, to Jones.

Q. You ran a hotel there at that time?

A. I ran a hotel there and I sold out to Mr. Jones.

Q. And immediately after selling out your hotel you went up there as you have stated?

A. Yes, sir.

Q. Who was with you, if anyone, at that time?

A. Percy McDonald.

Q. Were you in the cabin on the 9th day of May?

A. I was in the cabin on the 10th. We went in there and camped on the 9th just a few rods from the cabin, but we did not see the cabin; we didn't

know it was there until the next morning, when we ran on to it.

Q. You didn't see the cabin then on the 9th?

A. No, in the morning of the 10th we ran on to it and found we had [150] been camped only a little ways from it.

Q. Just describe that cabin as you found it there on May 10th, 1902.

A. The cabin was finished up and looked like somebody was occupying it. There was coffee there, and beans and such like; cooking utensils and such things in the cabin; a little cooking stove, and some bunks.

Q. Did it bear evidence of having been recently occupied?

A. Yes. Everything looked fresh; looked new in the cabin.

Q. What did you note in the way of slashing about the cabin?

A. There was a little slashing around there.

Q. What would you say the extent of it was?

A. I couldn't say exactly what the extent of it was; it was just slashed out around the cabin a little.

Q. Did you see any notice posted indicating who occupied the cabin?

A. There was a notice on the tree that said Dan O'Donnell.

Q. There was a notice on the tree?

A. There was a notice tacked on the tree.

Q. Describing the particular tract that was claimed by the homestead applicant?

A. I didn't pay very much attention to it, you know; I just happened to look at it and seen his name was on it.

Witness excused.

* * * * *

JOHN W. THURSTON, the homestead applicant, being next called in his own behalf, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. You are the homestead applicant for the land that is involved in this case in Section 12, Mr. Thurston? A. Yes, sir.

Q. When did you first become acquainted with that land?

A. In the fall of 1901 between July and Christmas. [151]

Q. And what was the condition of that land at that time?

A. I was up looking timber over and I ran across a trail and a small improvement started as a cabin.

Q. Do you know to whom this improvement belonged?

A. Only by inquiring. I inquired when I came back and it was stated to me that Mr. Small had done the work.

Q. That Mr. Small had done the work?

A. Yes.

Q. And was that how you came to make affidavit that those improvements were done by Mr. Small?

A. I understood he did the work there and that he was going to take it as a homestead.

Q. Now when were you there again?

A. I was there again between January and April, 1902. There was snow on the ground.

Q. Describe the improvements at that time.

A. I went up the same trail and across the same section and the cabin was completed and this man O'Donnell was living there.

Q. O'Donnell was living there? A. Yes.

Q. Now how far from this land were you living at that time?

A. About five miles; four and a half.

Q. That was in the year 1902? A. Yes.

Q. And have you lived there ever since?

A. Yes, sir.

Q. Well between 1902 and 1906 where were you living?

A. In 1904 I went up to Warnick, and that is just about a mile and a half from this same piece of land; it is a railroad station.

Q. Do you know who was living on this land between the interval elapsing between the time you first saw it and 1902? A. Mr. O'Donnell.

Q. What was the value of those improvements that were there in 1902, a rough estimate? [152]

A. Oh, I don't think a man could put them in there for less than \$200, I guess, if he would hire it done he couldn't; hire it put in there.

Q. Then you knew the land in May, 1902?

A. Yes, sir.

Q. And was that land unoccupied vacant land at that time?

A. Well, Mr. O'Donnell had that homestead.

Q. Mr. O'Donnell was occupying it?

A. He was occupying it, yes.

Q. When did you acquire any title to this land, any claim to it, Mr. Thurston, and by what process?

A. I was living a mile or so down there, and I found out I had better take my homestead right and use it, and so I went to O'Donnell and I says to him, what would he take for his improvements he had got up there, and says, "I don't know." I says, "If you don't sell out somebody is going to jump you on this continued residence proposition"; and he says, "I know it, but it's pretty hard for me to live up there and have to work, too." So I says, "I will give you a hundred dollars for your improvements and go ahead with the work and make it my home, because I am going in there some place"; and he says, "All right"; and I paid him the money and took a receipt.

Q. When was that?

A. The receipt shows that. I think it was March 26th, 1902.

Q. Is that the receipt which you received from him? A. Yes, sir.

Q. Refreshing your memory from that receipt, what date did the transfer occur?

A. October 22d, 1906. I rode out there in a hurry and asked him for a receipt for my money, and he gave me that.

Q. Now, Mr. O'Donnell was working in the vicin-

ity of the land during all those times, was he, freighting there?

A. Yes, freighting there, and he did most of the time. [153]

Q. Now, when did you take up your residence on the land?

A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.

Q. What was the date you took up your actual residence on the land?

A. December 11th, 1906. That is when we moved in; that is the residence I claim.

Q. What improvements did you put upon the land?

A. I have kept improving it since 1906. The first thing, I raised the foundation and put in a seven-room house; it cost me \$750 for the house the first thing.

Q. Of what is the house built?

A. Of No. 1 lumber.

Q. Dressed lumber?

A. Dressed lumber shingled outside; a good plastered house; every convenience in it; hot and cold water and all conveniences you can find in any house; trimmings; etc.

Q. Completely furnished? A. Yes, sir.

Q. What does your family consist of?

A. My wife and three children.

Q. What improvements outside of the house have you put upon the land?

A. I have a barn that cost me \$250 the first thing for carpenter work.

Q. Is that also made of dressed lumber?

A. Just sawed lumber, and thirty dollars worth of shingles on the roof; best No. 1 shingles.

Q. Have you anything else in the way of buildings on the place?

A. Chicken-house; my wife is in the chicken business.

Q. In the chicken business? A. Yes.

Q. What have you got in the way of clearing and slashing? [154]

A. I have about six acres slashed. We were afraid of fires and I slashed that for that reason; but I have about three acres under cultivation. I have never stepped it off, but I would call it three acres.

Q. Is that three acres completely cleared, the stumps off it?

A. Completely cleared and stumped; not a stump on it; and the ground is so soft that I hired a man and we spaded it up; just spaded it up; hired a man and I done lots of the spading in the garden myself.

Q. Anything in the way of fencing?

A. Yes, I have all this cultivated land fenced in on account of stock.

Q. Do you keep anything in the way of stock?

A. Five head.

Q. What else have you on the place?

A. Several horses and buggies; have several of them.

Q. Any farming implements?

A. Yes; farming implements. What I need to cultivate this land.

Q. Any chickens?

A. Yes, a lot of them; about 75 or 100, I guess; haven't we, Wife? I don't know how many; we sold off a lot of them.

Q. What would be the reasonable value of these improvements?

A. Oh, I guess about \$2,500 to the present date.

Q. Since you settled there in December, 1906, for what periods have you been absent?

A. I don't believe we have been off a minute. When we were down here the children were at home; we have a housekeeper there.

Q. So from the time you went on there to occupy the land in December, 1906, you have resided there continuously until the present time? A. Yes, sir.

Q. And at no time has the house been left alone?

A. No, it never has been left alone.

Q. When did you file your application? [155]

A. That was February 6th, 1907, the time the land was opened for entry and the plat went on file.

Witness excused.

Case closed.

* * * * *

State of Washington,
County of King,—ss.

Lois B. Greene, being first duly sworn, says:

That the foregoing is a true and complete transcript of the shorthand notes of the testimony in the above-entitled case, as the same was reported by her when given by the several witnesses.

LOIS B. GREENE.

Subscribed and sworn to before me this 6th day of June, A. D. 1910.

E. F. GREENE,

Notary Public in and for the State of Washington,
Residing at Seattle. [156]

THE DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY.

INVOLVING the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$,
Section 12, Township 39 North, Range 6 East,
Seattle Land District, Washington.

Now comes the St. Paul, Minneapolis & Manitoba Railway Company and appeals to the Honorable Commissioner of the General Land Office, from the decision of the Register and Receiver of the United States Land Office, at Seattle, Washington, bearing date May 24th, 1910, notice of which was served upon said Railway Company by letter from the Register of the said land office, dated June 16th, 1910.

Appellant alleges that the Register and Receiver in their said decision erred:

1. In holding and deciding that appellant's selection of the land in controversy was invalid for the reason that said land was occupied by a qualified settler at the date of said selection.

2. In holding appellant's selection of said land for cancellation.

The land in question was selected by appellant railway company on May 9th, 1902, under the Act of Congress of August 5th, 1892. The plat of the survey of said land was filed in the district land office on February 6th, 1907, and within the time allowed for that purpose said railway company duly filed in said office its supplemental selection list adjusting its original selection to the lines of the Government Survey, which supplemental list was thereupon accepted and approved by the district land office.

On February 6th, 1906, John W. Thurston filed an application [157] to enter the lands in controversy, with other lands, under the Homestead Law, alleging settlement thereon December 12th, 1906. His application was rejected for conflict with the railway company's selection whereupon he appealed to the Commissioner of the General Land Office by whom the decision of the Register and Receiver was confirmed. He thereupon further appealed to the Secretary of the Interior, alleging that during the year of 1901 Alfred Small settled upon the land in controversy, built a cabin thereon and made other improvements; that during the

month of March, 1902, Small transferred his improvements and claim to one Daniel O'Donnell, who at once commenced his residence on said land and continued to occupy the same until the fall of 1906, when he conveyed all his right, title and interest therein to the claimant, John W. Thurston.

On March 19th, 1910, the Secretary of the Interior modified the decision of the Commissioner of the General Land Office and directed that a hearing be ordered in order to afford Thurston an opportunity to show that the land in controversy was occupied by a qualified settler at the date of the selection thereof of the railway company.

The hearing so directed was duly ordered and held, and upon the record made thereat the Register and Receiver held and decided that at the time of the railway company's selection of said land the same was occupied by a qualified settler and that the railway company's selection was, for that reason, invalid and should be canceled.

Neither Small nor O'Donnell ever filed a homestead application for said land in the United States Land Office and I do not understand that it is so claimed. It is not claimed that Thurston settled upon the land in controversy earlier than December 12th, 1906, more than four years after the Railway Company's selection thereof. His claim, if any, therefore, must be supported upon the proposition that the mere occupation of the land in controversy by a qualified settler who never asserted a right to the land by filing a claim in [158] the United

States Land Office is a bar to a selection under the Act of 1892.

The Act of August 5th, 1892, 27 Stat. 390, grants to the St. Paul, Minneapolis & Manitoba Railway Company the right to select in lieu of certain lands relinquished by it to the United States, "an equal quantity of nonmineral public lands, * * * not reserved and *to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.*"

The only question in the case, therefore, is—"Had an adverse right of claim to land in controversy attached or been initiated at the time of the railway company selection thereof?"

The Supreme Court of the United States by a long line decision has established that an adverse right or claim does not attach nor is it initiated by mere settlement or occupation of the land; that notice of the claim to the United States Land Officers is indispensably necessary to give the claimant any standing and that his settlement alone is not sufficient for that purpose.

Lansdale vs. Daniels, 100 U. S. 113.

The case of *Water & Mining Co. vs. Bugsby*, 6 Otto, 165, involves the construction of the Act of Congress granting sections 16 and 36 in each township to the State of California, which Act provided that where any settlement should be made upon any such section before the same was surveyed, other land should be selected in lieu thereof by the State. It was claimed that the land involved was embraced in a pre-emption settlement existing at

the time of survey and was for that reason excepted from the grant to the State. But the Court held that the settler was under no obligation to assert his claim and he having abandoned it, the title of the State became absolute as of the date the survey was completed.

Railway Company vs. Dunmeyer, 113 U. S. 629, involves the construction of the Kansas Pacific Railway Company, which Act granted the odd numbered sections within specified limits, "not [159] sold reserved * * * and to which a pre-emption or homestead claim may not have attached at the time the line of said road was definitely fixed."

The land in dispute was embraced in an existing homestead entry at the time the line of the road was definitely fixed. It was claimed, however, that the homesteader had abandoned his claim and that, for that reason, his homestead claim had not attached. Discussing this claim the Court said:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated."

The case of *Buxton vs. Traver*, 130 U. S. 232, is particularly in point. Traver settled upon unsurveyed land in the State of California, but died before the survey thereof, and, consequently, without filing his pre-emption declaratory statement in the

United States Land Office. After the survey of the land his widow filed a declaratory statement, made the proofs required by law and received a patent for the land. Traver's daughters, and heirs, commenced an action against the widow to establish an interest in the land, claiming that Traver, by his occupation of the land, acquired a right of pre-emption therein, and that they, as his heirs, were equally entitled, with the widow, to an interest in said land. The Court held that as Traver never filed his declaratory statement, his right of pre-emption never attached to the land. The Court said:

“The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him,—If you wish to settle upon a portion of the public land and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. *If those steps are, from any cause, not taken, the proffer of the Government has not been accepted and a title in the occupant is not even initiated.*”

And speaking of the claim of the plaintiff as heirs of Traver, the Court said:

“What we have said as to the legal effect of deceased's occupation and improvement shows

that no title was initiated or [160] right of pre-emption created by them, and, of course, nothing was left by the deceased to be completed by his heirs."

This case conclusively establishes that the right of pre-emption is not created or attached or even initiated by mere settlement and occupation of the land. The fact that the case arose under the pre-emption law, while the claims of the settlers involved in this controversy must rest upon the homestead law is immaterial, as the right of the homestead claimant to settle upon unsurveyed lands as these were, rests upon the Act of May 14th, 1880, which allows such settler the same time to file his homestead application and perfect his entry as was then allowed to settlers under the pre-emption laws. Further the Supreme Court of the United States, in *Tarpey vs. Madsen*, 178 U. S. 215, held that in respect to the necessity of filing the claim in the United States Land Office pre-emption and homestead claimants stand upon the same footing.

The case of *Gonsales vs. French*, 164 U. S. 338, involves the construction of the Act of Congress reserving land in the Territory of Arizona for the purpose of being granted to the future state to be erected out of the same. It was claimed that certain settlements existing at the time of the survey excepted the land from the grant. The Court held, however, that mere possession and occupation of the land did not prevent the rights of the territory from attaching thereto. The Court said:

“The claim of the plaintiff in error, therefore, to a right of pre-emption was fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office. As they did not choose to assert their right by filing declaratory statement or by making an entry as pre-emptioners their mere possession did not prevent the rights of the territory from attaching to the school section when the survey was made. Nor did the plaintiff in error lawfully succeed to any possessory rights they may have had, as against the United States because such rights were merely personal to the settler and under U. S. Rev. Stat. 2263, were not assignable to the plaintiff in error.”

The case of *N. P. Ry. Co. vs. Colburn* involved the construction of the grant made to said railway company by act of July 2d, 1864. It was claimed that the occupation of the land by a qualified settler at the time the line of the company's road was definitely [161] located excepted the land from the railroad grant. This claim the Court rejected and held that no pre-emption or homestead claim attaches to a tract of land until an entry thereof in the local land office.

In *Tarpey vs. Madsen*, 178 U. S. 215, which involved the construction of the grant to the Union Pacific Ry. Co., the Court held that the mere occupation and possession of a claimant who does not file his declaratory statement is insufficient to protect his claim against a land grant. The Court

cited with approval its decision in the N. P. Ry. Co. vs. Colburn, *supra*, and said that they had therein distinctly held that no mere occupation of a tract of public land in and of itself excepted the tract from the operation of a railroad grant and that a settler could not dispute the claim of a railroad company until and unless he had filed his entry in the proper land office.

These decisions clearly establish that no adverse right or claim to the land in controversy herein had attached or been initiated at the time of the railway company's selection thereof, and that neither Small nor O'Donnell could, in view of their failure to file their claims in the district land office, dispute the claim of the railway company. This being so, it necessarily follows that Thurston, a third party, whose claim, if any, was not initiated until long after the right of the railway company had attached by its selection of the land, cannot dispute the claim of the railway company and assert in the former occupants a claim that they themselves never saw fit to assert.

That many of the cases cited relate to place lands so-called is immaterial. In such case if a pre-emption or homestead right or claim had attached to the land at the time the line of the railroad was definitely located such land was excepted from the grant. If such a claim had not attached, the land was subject to the grant and passed thereunder. By the act of August 5th, 1892, the right of selection is extended to lands to which an adverse right or claim had [162] not attached or been initiated at

the time of selection. The principle is the same in both cases. If no adverse right or claim has attached or been initiated, the land in one case passes under the grant and in the other case is subject to selection.

The case of *Donahue vs. St. P. M. & M. Ry. Co.* 210 U. S. 21, which arose under the Act of August 5th, 1892, has no bearing on the question at issue herein. In that case one Hickey was a settler upon unsurveyed land at the time the railway company selected the same. When the survey was made Hickey duly filed his claim in the District Land Office and appealed to the Commissioner from the adverse decision of the District Land Officers. A hearing was ordered in the matter at which Hickey's mother and heir duly established the fact of his settlement. As the result of the contest between Hickey's heir and the railway company, the Secretary of the Interior held that Hickey's right was prior and superior to that of the railway company and that his heir would be allowed to complete his entry. His mother and heir thereupon made homestead entry which she subsequently relinquished, whereupon the land was entered by Donahue. The Court claimed that Hickey's settlement, claim and entry segregated the land from the public domain and that the same was not subject to selection by the Railway Company. It will be noted that the case was one wherein the claimant was not only in possession of the land at the time of the railway Company's selection *but that his claim was duly presented to and allowed by the officers of the Land*

Department. Any suggestion that the Court in recognizing such an entry as superior to the claim of the Railway Company under its selection, intended thereby to reverse the long line of well-considered decisions herein cited and to hold that an adverse right or claim attaches or is initiated by mere possession and occupation of the land is utterly untenable.

It is respectfully submitted, that, as neither Small nor O'Donnell ever filed in the United States District Land Office notice of their claim, their right to the land in controversy had not attached or [163] been initiated at the time of the railway company's selection. The decision appealed from should, therefore, be reversed and the land in controversy awarded to the railway company.

THOS. R. BENTON,

Attorney for the St. Paul, Minneapolis & Manitoba
Railway Company.

Dated July 18th, 1910. [164]

UNITED STATES LAND OFFICE.

CONTEST 101.

Serial 01662.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
REPLY BRIEF.

Counsel in his argument in support of the Company's appeal asserts that "The Supreme Court of the United States by a long line of decisions has established that an adverse right or claim does not

attach nor is it initiated by mere settlement or occupation of the land; that notice of the claim to the United States Land Officers is indispensably necessary to give the claimant any standing and that his settlement alone is not sufficient for that purpose."

Counsel, apparently in support of such statement, cites certain decisions of the United States Supreme Court (100 U. S. 113, 113 U. S. 629, 130 U. S. 232, 164 U. S. 238, 179 U. S. 215, 210 U. S. 221), none of which are in point or establishes in any degree the contentions urged by counsel. On the contrary the decisions of the Courts including those cited by counsel hold that an adverse right or claim does attach and is initiated by settlement or occupation of unsurveyed land, and that no notice of the claim to the United States Land Office is necessary to give the claimant standing and that his settlement is amply sufficient for that purpose.

The reason for such ruling is readily apparent. No provision is made by law or the rules and regulations of the Department of the Interior for the recording of claims on unsurveyed land, and until the land is identified by survey, the homesteader and pre-emptor must rely upon his settlement alone as indicating to the world his claim to the land.

Even in such cases as are cited, the decisions merely hold in effect that where the lands are surveyed and the opportunity is afforded the pre-emptor or homesteader to record his [165] claim, his failure to do so within the period fixed by the laws of the Department would remove his claim from the

excepting clause of the grant. Good administration would require that the Railroad Company should upon the filing of the township plat or within a reasonable time thereafter, be advised as to the particular lands passed by the grant. Hence the reason and logic of the rule requiring the homesteader or pre-emptor to make of record his claim within a limited period after it had been made possible for him to do so.

The fact that the cases cited by counsel affecting railroad lands relate to those within the place limits is said by counsel to be immaterial. Legislation and the decisions of the Court and the Department affecting the so-called grant in place and the grant of indemnity are as divergent as the suns.

Title to land within the place limits of the grant passes without selection and approval (Howard vs. Perrin, 200 U. S. 71, 50 Law Ed.), but indemnity lands do not. No interest in lands within the indemnity limits of the grant is acquired until the selection is approved by the Sec. of the Interior (Sjoli vs. Dreshel, 199 U. S. 564, 50 Law Ed.). Railroad grants take effect *in praesenti* of public lands if location is all there is to be done to pass the land (Northern Lbr. Co. vs. O'Brien (C. C. A.), 139 F. 164, Acts 1960-61, page 136), and title passes on filing map of definite location (So. Pac. R. Co. vs. Lippman, Cal., 83 page 445), or actual construction of the road and compliance with other statutory conditions. (Ore. Short Line R. Co. vs. Quigley, 10 Idaho, 10-70, 80 page 401.)

In the matter of indemnity lands, no title equitable or otherwise, passes to the Railroad upon selection. The lands selected must on the date of the tender of the selection [166] be of the kind, character and condition provided by the grant to make it susceptible of acquisition thereunder. The validity of the list is determined by the status of the land at the time of the presentation of the said list.

Under the act of Aug. 5, 1892, the lands subject to selection by the Company are restricted to non-mineral lands, "Not reserved, and to which no adverse right or claim shall have attached, or been initiated at the time of the making of such selection." On the date of the tender of the Railroad selection an adverse right or claim had attached and been initiated. Had it been possible on the date of the tender of the company's list to establish such fact, said list would have been forthwith rejected and a subsequent change in the status of the land would not operate to revive said list. The opinion of the Hon. Sec. in case of Kern Oil Co. et al. vs. Clarke, is enlightening.

"Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands who were there at the invitation or by the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public land legis-

lation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claims under the new law from disturbing the possessory rights or imperfect claims of others." (31 L. D. 295.) [167]

"Generally speaking, land which is occupied is not subject to selection. It has not been determined that there are any exceptions." (31 L. D. 320.)

"It is clear that this land showed evidence of occupancy when the nonoccupancy affidavit, in support of the Litchfield's application was executed, and when that application was presented the occupant was yet in possession of the lands and improvements. The conditions were such as to justify your conclusion that the signs of settlement and improvement were sufficient to charge the selector with notice thereof. Under the rulings of the Department, land in the condition of this is not vacant within the purview of the act of 1897". Litchfield et al. vs. Anderson, 32 L. D. 298.)

The fact that the protestant and homestead applicant was not the occupant of the land on the date of the tender of the Company's list, which fact is urged as a reason for the reversal of the judgment of the Local Office is not material to the issue herein involved.

"The status of indemnity lands at the date of selection determines the right of the Company thereto. This is well settled by a long

line Departmental decisions (3 L. D. 51, 22 L. D. 273, 10 L. D. 504, 12 L. D. 19, 12 L. D. 535.)

“The status of a tract of land at the date of its selection determines the right of the Company thereunder; and if at such time there exists an adverse claim sufficient to bar said selection, the subsequent abandonment of said [168] adverse claim cannot inure to the benefit of the company under its selection so made. *N. P. R. R. Company vs. Loomis et al.*, 21 L. D. 395.”

“The right of a railroad company to take a tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same.” (22 L. D. 493.)

We submit that the decisions of the local office are correct and ought to be sustained, for which action we pray.

E. M. COMYNS,
Attorney for J. W. Thurston.

State of Washington,
County of King,—ss.

Edward M. Comyns, being duly sworn, says that he made service of the foregoing reply brief by mailing a copy thereof by registered mail to Thos. R. Benton, Attorney for the St. Paul, Minneapolis and Manitoba Ry. Co., at his postoffice address at St. Paul, Minn.

EDWARD M. COMYNS.

Subscribed and sworn to before me this 31st day
of Aug., 1910.

J. HENRY SMITH,
Register. [169]

GENERAL LAND OFFICE,
WASHINGTON, D. C.

October 25, 1910.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

INVOLVING: E. $\frac{1}{2}$ NW.④ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$,
Sec. 12, T. 39, N., R. 6 E., W. M., Washington.

CALLING FOR AFFIDAVITS.

Register and Receiver,
Seattle, Washington.

Sirs:

April 1, 1910, you were directed to appoint a day
for a hearing in the above-entitled case, under the
instructions from the Department, dated March 19,
1910, wherein you held that,

It would seem from the allegations contained
in the affidavit accompanying the appeal that
the appellant is entitled to a hearing in order
that he may be afforded an opportunity of
proving the allegations made by him; because,
if, as a matter of fact, the land was occupied
by a *qualified settler* at the date of the com-
pany's selection, such land was not subject to
selection (37 L. D. 193, 502 and 576).

You accordingly named May 24, 1910, and notified the parties in interest. The appellant was present with his witnesses and attorney, but the company was in default. You held, from the evidence submitted by Thurston, adverse to the company, and the case is here on appeal from your action.

It is essential that the evidence be clear as to whether the land was occupied by a *qualified settler* May 9, 1902, the date of the company's selection.

Dan O'Donnell, of Lawrence, a witness, testified that, in 1902, he resided at Maple Falls, in charge of a mine that he bought of a squatter, a Mr. Cole, on the land in question, who had a trail in there and started a cabin, that he paid him (\$100) one hundred dollars for location fees; that the cabin was completed about March, 1902; that he posted notices indicating what land was claimed by him, and was occupying the land on May 9, 1902.

The evidence was *ex parte* and there appears in the record of [170] the proceedings no testimony tending to prove his qualifications to make entry of the land. You will, therefore, call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses, as to *his* qualifications on May 9, 1902, for consideration with the evidence in the case.

Very respectfully,
S. V. PROUDFIT,
Assistant Commissioner. [171]

UNITED STATES LAND OFFICE.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

INVOLVING: E. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec.
12, T. 39 N., R. 6 E., W. M., Washington.

AFFIDAVIT REQUIRED BY HON. COMMIS-
SIONER'S LETTER "F," SEATTLE, 01662
OF OCT. 25, 1910.

State of Washington,
County of Whatcom,—ss.

Dan O'Donnell, being first sworn, says that he is the indential Dan O'Donnell who testified in the above-entitled case at the hearing had before the United States District Land Office at Seattle, Wash., on May 24, 1910. That on May 9, 1902, he was a qualified settler of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, township 39 N., Range 6 E. That on said date he possessed all the qualification requisite to make entry of said land under the homestead laws.

DAN O'DONNELL.

Subscribed and sworn to before me this 16th day of December, 1910.

[Seal]

W. H. PEMBERTON,
Notary Public in and for the State of Washington,
Residing at Bellingham.

State of Washington,
County of Whatcom,—ss.

Herman Steiner and H. E. Leavitt, being duly sworn say, that they and each of them are well acquainted with Dan O'Donnell who subscribed and swore to the foregoing affidavit and were so acquainted with said Dan O'Donnell on May 9, 1902; that the facts set forth in the foregoing affidavit relative to the qualification of Dan O'Donnell to make entry on the land described are true of their knowledge.

HERMAN STEINER.

H. E. LEAVITT.

Subscribed and sworn to before me this 21st day
of December, 1910.

CHARLES W. BEAL,

Notary Public in and for the State of Washington,
Residing at Maple Falls, Wash. [172]

GENERAL LAND OFFICE.

WASHINGTON.

March 9, 1911.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO.

INVOLVING: E. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec.
12, T. 39 N., R. 6 E., Washington.

DECISION ADVERSE TO COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

The land involved herein was selected by said Company, May 9, 1902, per list No. 44, prior to survey, under the provisions of the act of August 5, 1892 (27 Stat. 390). The official plat of survey of the township in which the land lay was filed in the local office on February 6, 1907. Thurston, the same day, filed his homestead application for the same land alleging that he had commenced settlement thereon, December 11, 1906, with improvements of the value of \$650.00, consisting of a dwelling-house, 16X28 feet, containing six rooms, chicken-house, cowshed, one acre cleared and half an acre slashed.

His application was rejected, February 27, 1907, by your office, because of the company's list No. 44, filed May 9, 1902.

Your action was approved by this office, on appeal, July 23, 1909, and, on further appeal, the Department, March 19, 1910, affirmed the decision of this office on the record thus made, but, in the appeal to the Department, Thurston complained that your office had erred in failing to order a hearing, and accompanied his appeal with his affidavit, corroborated by that of two other persons, that the land was first settled upon in the year 1901, by one Alfred Small, who built a cabin thereon and resided there, improving the same and occupying it until

March, 1902, when he transferred his claim to Daniel O'Donnell, who immediately commenced his residence on the land and continued to occupy it until the fall of 1906, when he conveyed [173] all his right to the land, together with the improvements thereon, to Thurston; that during the period of O'Donnell's occupancy of the land, he was qualified to make homestead entry and occupied it with a view to making such entry; that appellant settled on the land in December, 1906, and has lived continuously there ever since; that the improvements thereon, at that time, were worth the sum of \$2,000, and that, at all times up to February 6, 1907, when the plat was filed in the local office, he was ignorant of the fact that the railway company was claiming the land in any way.

Upon this showing, the First Assistant Secretary held that the appellant was entitled to a hearing, in order that he be afforded an opportunity to prove the allegations made by him; because if, as a matter of fact, the land was occupied by a qualified settler at the date of the company's selection, such land was not subject to selection (37 L. D. 193, 502, and 576).

You, by letter "F" of April 1, 1910, were accordingly directed to appoint a day for a hearing, with notice to the parties in interest to appear, with their witnesses, and submit testimony as to the status of the land on May 9, 1902, the date of the company's selection.

You named May 24, 1910, for the hearing before your office, and notified the parties.

On the day appointed, Thurston was present, with his attorney and witnesses, but the company was in default.

Thurston and five witnesses in his behalf, testified, but no witnesses were examined for the company.

You found, from the evidence submitted, that is satisfactorily appeared that, on May 9, 1902, the land in controversy was occupied by a qualified settler, and held that the selection of the same by said company should be canceled and that the homestead application by said Thurston for the same land should be allowed.

The record of the case shows that a copy of your decision of May 24, 1910, adverse to the company, was served by registered mail, on its counsel, Thomas R. Benton, at St. Paul, Minnesota, [174] June 20, 1910, who filed an appeal therefrom July 18, 1910, and a reply brief by the attorney for Thurston was filed, August 31, 1910.

September 1, 1910, you transmitted the record, as made in the case, under the instructions of the Department in its decision dated March 19, 1910.

Your findings of facts as shown by the evidence submitted in connection with the corroborated affidavit of Dan O'Donnell, enclosed with your letter of December 23, 1910, is correct, and no attempt appears to have been made to traverse the same. Your conclusions are in accordance with the law, as enunciated in 37 L. D., 193, 502, and 576.

Your action is, therefore, approved, and the company's list No. 44, as to the tracts involved herein,

is hereby held for cancellation, subject to appeal.

You will so advise Thurston. The Company is notified by this office.

Very respectfully,

S. V. PROUDFIT,

Assistant Commissioner. [175]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle Washington.

See "F" July 25, 1911.

Serial No. 01662.

Sup. Application.

Receipt No. 335473.

APPLICATION.

I, John W. Thurston (Male), a resident of Maple Falls, Whatcom County, Washington, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the the SE.¼ SW.¼, Sec. 1, E.½ NW.¼, NE.¼ SW.¼, Section 12, Township 39 N., Range 6 E., Willamette Meridian, containing 160 acres, within the Seattle, Washington land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I am a native born citizen of the United States, and am married and over the age of 21 years: that my postoffice address is Maple Falls, Washington; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to the settlement, residence, and culti-

vation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws, _____

(Here describe former homestead entry, etc.)

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor

other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

JOHN W. THURSTON. [176]

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by Edward M. Comyns, 323-24 White Building, Seattle, Washington; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Seattle, King County, Washington, within the Seattle Washington land district, this 22d day of August, 1911.

JOHN C. DENNY,
Register.

UNITED STATES LAND OFFICE at Seattle,
Wash.

August 22, 1911.

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Sec-

tion 2289, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

JOHN C. DENNY,
Register.

This homestead application is made in lieu of like homestead application made February 6, 1907, said original application having been heretofore transmitted with the files in the case of John W. Thurston against St. Paul, Minneapolis & Manitoba Railway Company, Seattle 01662, and not returned to the local land office.

JOHN C. DENNY,
Register. [177]

NOTICE OF INTENTION TO MAKE PROOF.
DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE at Seattle, Wn.

Aug. 10, 1912.

I, John W. Thurston, of Maple Falls, Washington, who, on August 22, 1911, made Homestead Entry, No. 01662, for SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1; E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 N., Range 6 E., Willamette Meridian, hereby give notice of my intention to make Final five year Proof, to establish my claim to the land above described, before Register and Receiver, at Seattle, Washington, on the 28th day of September, 1912, by two of the following witnesses:

Roy Fox,	of Glacier, Wash.
W. D. Fox,	of Glacier, Wash.
Charles Bourne,	of Glacier, Wash.
Herman Steiner,	of Glacier, Wash.

JOHN W. THURSTON.

August 10, 1912.

Notice of the above intention to make proof will be published in the Leader, Maple Falls, Washington, for a period of five consecutive weeks, which I hereby designate as the newspaper published nearest the land above described.

JOHN C. DENNY,
Register. [178]

NOTICE FOR PUBLICATION.

(Register)

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE at Seattle, Wash.

August 10, 1912.

NOTICE is hereby given that John W. Thurston, of Maple Falls, Washington, who, on August 22, 1911, made Homestead Entry Serial No. 01662, for the

SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$,

Section 12, Township 39 N., Range 6 E., Willamette Meridian, has filed notice of intention to make five year Proof, to establish claim to the land above described, before the Register and Receiver, U. S. Land Office, at Seattle, Washington, on the 28th day of September, 1912.

Claimant names as witnesses:

Roy Fox, of

W. D. Fox, of

Charles Bourne, of

Herman Steiner, all of Glacier, Washington.

JOHN C. DENNY,
Register.

vs. Albert R. McPhee and Frances McPhee. 191

CERTIFICATE AS TO POSTING OF NOTICE.

September 28, 1912.

I HEREBY CERTIFY that the above notice, or copy thereof, was by me posted in a conspicuous place in my office for a period of more than 30 days, I having first posted said notice on the 10th day of August, 1912. Notice posted continuously from Aug. 10, 1912, to September 28, 1912.

JOHN C. DENNY,

Register. [179]

DEPARTMENT OF THE INTERIOR,

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Washington.

Sept. 28, 1912. No. 01662

Receipt No. 940649.

FINAL PROOF.

TESTIMONY OF CLAIMANT.

Question 1. What is your full name, age, and postoffice address?

Answer. John W. Thurston, age 35 years, Maple Falls, Wash.

Question 2. Are you a native-born citizen of the United States, and if so, in what State or Territory were you born? (If foreign born, or if native-born and later naturalized in a foreign country, see Note 1.)

Answer. I am and was born in California.

Question 3. Are you the same person who made Homestead Entry No. 01662, at the Seattle, Washington, Land Office on the 22d day of August, 1911, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and

NE.1/4 SW.1/4, Section 12, Township 39 N., Range E., Willamette Meridian?

Answer. I am.

Question 4. Are you married or single?

Answer. Married.

Question 5. If married, of whom does your family consist?

Answer. Wife and four children.

Question 6. If a married woman, state whether your husband now has an unperfected homestead entry, and during what time he has resided on this land with you. Also state his citizenship qualifications. (See Note 1 at bottom of third page.)

Answer.

Question 7. When did you first establish actual residence upon this land?

Answer. In February, 1907.

Question 8. When was your house built on this land? .

Answer. In December, 1906, began to build and finished house in February, 1907.

Question 9. Have either you or your family ever been absent from the homestead since establishing residence?

Answer. No.

Question 10. If there has been such absence, give the dates covered by each absence; and as to each absence state whether you, your family, or both, were thus absent and the reason for each such absence.

Answer. No absences. During 1908 my wife

and I were away for three weeks, but my children remained on the homestead. [180]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer:

		Acres.		Acres	Ft. timber
Subdivision.		Cultivable.		timbered.	
SE.1/4	SW.1/4, Sec. 1	40		2d growth	
NE.1/4	NW.1/4, Sec. 12	40		40	1 million
SE.1/4	NW.1/4, Sec. 12	40		40	1 million
NE.1/4	SW.1/4, Sec. 12	40		40	1 million

Question 12. State by subdivisions the number of acres cultivated, kind of crop planted, and amount harvested, each year. How many acres of the claim are now cleared or broken and under cultivation? If used for grazing only, state number and kind of stock grazed each year, and by whom owned.

Answer. In 1907 cleared one acre and planted same. County road took three-fourths of an
 19 acre of my clearing, but I now have one acre
 19 free of stump and under cultivation and three
 19 other acres slashed—one and one-half acres of
 19 which is ready for cultivation. Crops have
 19 averaged an acre each year. Have raised stuff
 19 for family use. There is no market. Have
 19 raised vegetables, hay and small fruit. Have
 19 *planted* \$35 for fruit trees, but have only two
 19 living. I have a team of horses and chickens
 and ducks, etc.

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer. Subdivision. SE.1/4 SW.1/4, Sec. 1.

Character of Improvements.

My house has 9 rooms with hot and cold water piped through house. House is papered inside and painted outside. House is 11½ stories. Barn 28x30. Cellar that costs about \$100. Three chicken houses. 300 feet of chicken-yard fence of wire. Water is piped 500 feet from creek. Water is piped to the barn. Have about \$500 worth of road work. All of my improvements including clearing worth about \$3,000.

Question 14. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Answer. No and not used for trade or business.

Question 15. Are there any indications of coal, salines, or minerals of any kind on the land? If so describe what they are.

Answer. No.

Question. Have you ever made any other homestead entry? If so, describe the same.

Answer. No.

Question 16. Have you sold, conveyed, or agreed to sell or convey any portion of the land? If so, to whom and for what purpose?

Answer. I have not.

Question 17. Have you optioned, mortgaged, or agreed to option or mortgage, or convey this land, or any part thereof? If so, when, to whom, and for what purpose and in what amount? [181]

Answer. No.

Question 18. Have you any personal property of any kind elsewhere than on this claim? If so, describe the same, and state where the same is kept.

Answer. No.

~~Question 19.~~

Question 20. Have you, since August 30, 1890, made any entry or filing (not mineral) other than homestead? If so, describe the same by legal subdivisions, or by number, kind of entry, and office where made.

Answer. None made.

JOHN W. THURSTON.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by E. M. Comyns, Seattle, Wash.; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Seattle, King County, Washington, within the Seattle, Washington, land district, this 28th day of September, 1912.

JOHN C. DENNY,
Register. [182]

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

I, John W. Thurston, having made a Homestead entry of the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 N., Range 6 E., Willamette Meridian, subject to entry at Seattle, Washington, under section No. 2289, of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native-born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the February, 1907, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

JOHN W. THURSTON.

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that I verily believe affiant to be a credible person and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before

me, at my office, in Seattle, King County, Washington, this 28th day of September, 1912.

JOHN C. DENNY,
Register. [183]

DEPARTMENT OF THE INTERIOR.
HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Washington,
Sept. 28, 1912. No. 01662.

FINAL PROOF.

TESTIMONY OF WITNESS.

Question 1. What is your full name, age, and postoffice address?

Answer. Roy Fox; age, 36 years; Glacier, Wash.

~~Question 2.~~

Answer.

Question 3. How long have you known the claimant in this case and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, Township 39 N., Range 6 East, Willamette Meridian, the land embraced in Homestead Entry, No. 01662, made at the Seattle, Washington, Land Office?

Answer. Land and claimant 7 years.

Question 4. Is entryman married?

Answer. Married.

Question 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

Answer. No and not used for trade or business.

Question 6. When did entryman settle upon the homestead?

Answer. December, 1906.

Question. 7. At what date did entryman establish actual residence thereon.

Answer. In February, 1907.

Question 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

Answer. Yes.

Question 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

Answer. No absences.

Question 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

Answer. No absences. Claimant and family were away once two or three weeks, but children remained on the land at that time. [184]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer. Subdivision.

Cannot subdivide the land and give the data, but think there are 3 or 4 million feet of timber on the land. About two-thirds or one-half could be cultivated and balance would be good pasture land.

Question 12. State by subdivisions the number of acres cultivated and kind of crop planted, and amount harvested each year. How many acres of the claim are now cleared or broken and under cultivation? If used for grazing only, state num-

ber and kind of stock grazing each year and by whom owned.

Answer. In 1907 he had a garden. Each year since that time he has had a crop. About an acre is under cultivation. Cultivation has been about an acre each year. Besides the cultivated land now under cultivation, the county road took about three-quarters of an acre of the land. I think he has three or four acres of land slashed and partly cleared besides the cultivated land. He has raised vegetables of all kinds and berries. Also he has seeded some of the burned over land. He has raised stuff for his own use. He has a team of horses and chickens and ducks.

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer.

Submission

Charter of Improvements.

SE.1/4 SW.1/4, Sec. 1.

7-room house not including pantry and bathroom. He has a good barn. Chicken-house. Root cellar. Road work. Water is piped from creek into his house and to barn. Value of improvements including clearing, \$2,500.

Question 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. No.

Question 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

Answer. I have not. [185]

Question 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony.

Answer. I have.

Question 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

Answer. On the average three times a week for the past five or six years.

Question 18. Are you interested in this claim, or related to the claimant? If so, how?

Answer. Not interested. Not related.

ROY FOX.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by John W. Thurston, Maple Falls, Wash.; that I verily believe deponent to be the identical person hereinbefore described and that said deposition was duly subscribed and sworn to before me at my office

vs. Albert R. McPhee and Frances McPhee. 201

in Seattle, King County, Wash., with the ~~land district~~ ^{land} district Seattle, Washington, land district, this 28th day of September, 1912.

JOHN C. DENNY

Register. [186]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Wash.

Sept. 28, 1912. No. 01662.

FINAL PROOF.

TESTIMONY OF WITNESS.

Question 1. What is your full name, age and postoffice address?

Answer. Charles Bourne; age, 43 years; Glacier, Wash.

Question 2.

Answer.

Question 3. How long have you known the claimant in this case and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, Township 39, N. Range 6 E., Willamette Meridian, the land embraced in Homestead Entry, No. 01662, made at the Seattle, Wash., Land Office?

Answer. Land and claimant 7 years.

Question 4. Is entryman married?

Answer. Married.

Question 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

Answer. No and not used for trade or business.

Question 6. When did entryman settle upon the homestead?

Answer. Six years ago.

Question 7. At what date did entryman establish actual residence thereon?

Answer. In February, 1907.

Question 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

Answer. Yes, sir.

Question 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

Answers. No absences.

Question 10. If there have been any absences, give the dates covered by such absences, stating who was absent and for what reason.

Answer. None. [187]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer.

Subdivision	Acres Cultivable	Acres Timbered	Feet Timber
On the SE. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, there is no timber. Other three forties have 1 million feet on each forty, or 3 million feet altogether. In- cluding pasture, all of the land could be culti- vated.			

Question 12. State by subdivision the number of acres cultivated and kind of crop planted, and amount harvested each year. How many acres of the claim are now cleared, or broken, and under cultivation? If used for grazing only, state number and kind of stock grazer each year and by whom owned.

Answer. I am sure that he has had crops for past five years. He has the stumps out of an acre.
19 The county road took up quite a lot of his clearing. He has raised vegetables and berries
19 for his family's use. He has ten or fifteen acres of burned over land seeded down to
19 pasture. He has planted fruit trees, but there are only two living. His crops have averaged
19 an acre each year.
19

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer.

Subdivision	Character of improvements
On the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1.	Nine room house, including pantry and bathroom. House is papered inside and painted outside. House has water piped into it from creek. Barn 28x30. Chicken-houses. Root house. Quite a lot of road work, all worth about \$2,500.

Question 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. No.

Question 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

Answer. I have not. [188]

Question 16. Have you personal knowledge, from your own observation that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with above testimony?

Answer. I have.

Question 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

Answer. I live on the adjoining land and have lived there three years. Also lived near his land before that time. Have seen him or family on the land nearly every week.

Question 18. Are you interested in this claim, or related to the claimant? If so, how?

Answer. Not interested. Not related.

CHARLES BOURNE.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition

was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by John W. Thurston, Maple Falls, Wash.; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Seattle within the Seattle, Wash., land district, this 28th day of September, 1912.

JOHN C. DENNY,
Register. [189]

GENERAL LAND OFFICE,
WASHINGTON.

January 10, 1913.

NOTICE—ACT JUNE 22, 1910 (36 STAT. 583).

FINAL CERTIFICATE AUTHORIZED
UPON CONDITION.

Register and Receiver,
Seattle, Washington.

Sirs:

On August 22, 1911, John W. Thurston, of Maple Falls, Washington, made homestead entry No. 01662, at your office, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., W. M. Final proof was submitted in support thereof September 28, 1912, and action thereon was deferred because of a protest by the chief of field division. Plat of survey was filed in your office February 6, 1907.

Claimant, in his final proof, alleges settlement on the land in February, 1907. His application was

presented on February 6, 1907, but owing to a contest with the St. Paul, M. & M. Railway Company, his application was not allowed until the above date.

This land was withdrawn July 26, 1906, under the Coal Land Laws; later included in Coal Land Withdrawal by Executive Order of July 7, 1910. No other withdrawals appear of record.

On August 10, 1912, claimant filed his selection to receive patent exclusive of the coal deposits, under the act of March 3, 1909 (36 Stat. 844). This selection will be considered hereafter.

Under date of October 26, 1912, a special agent of this office submitted a report on this land, wherein he states that he found the entryman living on the tract of land with his family, and learned from the neighbors that he had resided thereon continuously for nearly six years. The improvements consist of a frame house of 7 rooms, with bath and pantry, two porches, well built and complete, value \$1400; root house, frame barn, gravity water system for the house and barn, 3 acres fenced and partly cleared, one acre in cultivation, and another acre which had been cleared had been taken for a railroad and wagon road. The value of the improvements is about \$2400. Claimant keeps a team of work horses; also a cow, pigs, chickens and geese. The agent further reports that Mr. Thurston has cut from 250 to 350 thousand feet [190] of fir timber from the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 1, the same being valued at \$1.00 per thousand. This area has since been burned over and sowed to grass, but there

is very little pasture on it at present. Claimant has also cut and sold 675 cords of cedar wood from the land in Section 12. He states that he is clearing this area and preparing the same for cultivation. The agent reports that this land is good soil and better than the average.

No timber trespass case against the claimant is of record in this office.

In view of the fact that the date of claimant's alleged settlement was in December, 1906, and as the land had previously been withdrawn because of its coal character in July of the same year, it would appear that the claimant is not entitled to an election under the Act of March 3, 1909, above, but the same must be adjudicated under Sec. 1 of the act of June 22, 1910 (36 Stat. 383). Under circular of September 9, 1910, containing the instructions relative to the above act, it is provided for in Par. 3 that those who have initiated non-mineral entries, selection or locations prior to the passage of this act, on lands withdrawn or classified as coal, may perfect the same under the provision of the law under which said entries are made, but shall receive a limited patent provided for in the act, unless the lands are restored to entry under the general land laws prior to final action, or unless within thirty days from receipt of notice in cases where final proof has been made, or prior to final proof where such proof has not been submitted, they submitted evidence, or preferably the sworn statement of experts or practical miners, that the land is, in fact, non-coal in character, together with an application for classification.

You will, therefore, inform the entryman that he is hereby allowed thirty days in which to make an application for classification of the land, as above stated, and that if he fails to file said application, or appeal within this time, the final certificate will be issued containing the coal reservation, in accordance with the act of June 22, 1910. [191]

The agent's report has been carefully considered, and the case is clearlisted and closed as to the field division. Proof has been examined and found to be regular and satisfactory, and if there is no further protest or conflict of record, you are directed to issue the final certificate containing the above coal reservation, in the event that claimant in the time allowed him fails to file an application for classification.

Respectfully,

Commissioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. January 6, 1920. F. M. Harshberger, Clerk. [192]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
and BELLINGHAM BAY IMPROVE-
MENT COMPANY, Corporations,
Defendants.

**Separate Motion of Great Northern Railway
Company.**

Comes now the defendant Great Northern Rail-
way Company and separately moves the Court as
follows:

I.

That the Court dismiss the above-entitled cause
as to this defendant upon the ground that the
amended bill of complaint (being the last amended
complaint and the one served December 9, 1920)
fails to state facts sufficient to constitute a valid
cause of action in equity.

THOMAS BALMER,
Solicitor for Defendant Great Northern Railway
Company. Postoffice Address: King Street
Passenger Station, Seattle, Washington.

We hereby acknowledge service of the foregoing

motion and receipt of a true copy thereof, this 24th day of December, 1920.

S. M. BRUCE.

By D. W. FEATHERKILE,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28th, 1920. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [193]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
and BELLINGHAM BAY IMPROVE-
MENT COMPANY, Corporations,
Defendants.

**Separate Motion of Bellingham Bay Improvement
Company.**

Comes now the defendant Bellingham Bay Improvement Company and separately moves the Court as follows:

I.

That the Court dismiss the above-entitled cause as to this defendant upon the ground that the amended bill of complaint (being the last amended

complaint and the one served December 9, 1920) fails to state facts sufficient to constitute a valid cause of action in equity.

CLINTON W. HOWARD,

Solicitor for Defendant Bellingham Bay Improvement Company. Postoffice Address: 206 First National Bank Building, Bellingham, Washington.

Service accepted. December 24, 1920.

S. M. BRUCE.

By D. W. FEATHERKILE,

For Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28, 1920. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [194]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. MCPHEE and FRANCES MCPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,
Defendants.

Decision.

Filed July 19, 1921.

S. M. BRUCE, Attorney for Plaintiffs.

CLINTON W. HOWARD, Solicitor for Bel. Bay
Imp. Co.

THOMAS BALMER, Solicitor for Gt. Northern
Ry. Co.

NETERER, District Judge.

Plaintiffs seek to establish title to the west half of the NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12, Township 39 North, Range 6 East, and to have the defendants, in whom the said title rests by virtue of patent issued on the 24th day of July, 1919, declared as trustees for the plaintiff. Plaintiff in substance alleges that in 1901 one C. C. Cole qualified to enter public lands, settled upon and claimed said land with the intention of acquiring a homestead. Said lands at the said time were unsurveyed. Cole erected a home and opened roads, and in the month of October, 1891, sold his improvements and right of occupancy to Daniel O'Donnell, qualified to make a homestead entry upon public lands; that O'Donnell went into the possession of said land with the intention of acquiring title, establish his residence, "built houses and sheds, fenced and cleared ground and posted notices showing the particular lands claimed by him," and continued to reside on said land until 1906, when for a valuable consideration he sold and conveyed his possessory right to one Thurston, qualified to enter public lands, who

entered upon the land for the purpose of acquiring homestead and continued in possession until November, 1906, when for value he sold his improvements and possessory rights to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, to Peter Beebe, who was qualified to enter public lands with the intention of acquiring title under the homestead laws; that in September, 1909, for a valuable consideration, Beebe sold and conveyed his possessory rights and improvements [195] to the plaintiffs, who entered into the possession of said lands for the purposes and intention of acquiring title thereto under the homestead laws, plaintiff being qualified to enter lands under the public land laws; that on the 19th day of May, 1902, while O'Donnell was actually residing upon the said land with the intention as stated, the land being unsurveyed, the defendants filed in the office of United States Land Office at Seattle, List No. 44, selecting said lands among others as lieu selection under the Act of Congress, approved August 5, 1892; that on February 6, 1907, the survey for said land was filed, and on the 23d of said month defendants described said lands conformable to such survey, which conformed to the lands claimed by the plaintiff by reason of the possessory rights and improvements made thereon, and notices posted; that the defendants knew of the rights and claims of the plaintiffs and his grantors, and that said lands were settled upon, and that homestead rights had been initiated and actively asserted; that on September 27, 1909, plaintiff made application to file his homestead entry on and for said land; tendered the money to the proper officers,

which application was rejected because in conflict with lieu Selection List No. 44. From said decision plaintiffs appealed to the Commissioner of the General Land Office, and thereafter to the Secretary of the Interior, and that the proofs presented establish the right of the plaintiff to said land; that the filing of List No. 44 was a fraud upon the plaintiffs' grantors, making defendants trustees for the plaintiffs in obtaining the patent by misleading the officers of the Land Department; that the Land Department committed error of law in denying to the plaintiffs such land and awarding same to defendants. Many other allegations appear in the bill of complaint, but this is all that is material. The defendants move to dismiss. From the exhibits and proceedings in the Land Department the proofs entered are set forth in the complaint, it appears that on September 27, 1909, plaintiff, McPhee, tendered his homestead application for [196] for the lands herein described, which was rejected December 8, 1910, and November 18, 1914, for conflict with selection List No. 44, filed May 19, 1902, by the St. Paul, Minneapolis & Manitoba Railway Co. under the list filed May 19, 1902, under the Act of August 5, 1892, 27 Stat. 390, and plat of survey was filed in the local office February 6, 1907. On February 23, 1907, the Railway Co. described the same lands as conforming to the survey. On April 8, 1916, plaintiff filed a petition for the exercise by department of supervisory authority in the matter of his application, which was decided April 18, 1916, against

the plaintiff. In the decision the Assistant Secretary says:

“The affidavit of McPhee alleges that the land applied for by him was, in 1901, embraced in the settlement of one Al. Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of railway company's list. O'Donnell later sold his improvements to John W. Thurston, it being further alleged that O'Donnell's house or cabin was situated upon the SW. $\frac{1}{4}$ N. $\frac{1}{4}$, Sec. 12, as to which McPhee is corroborated by one Benson. The affidavit of Peter Beebe states that beginning in August, 1906, he claimed a settlement right upon the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12. In November, 1906, however, in consideration of \$50.00 paid to him by Thurston he changed his claim to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which included the tract upon which O'Donnell's cabin was located. No affidavit by O'Donnell has been filed by McPhee.

“The records of the department disclose that upon February 6, 1907, John W. Thurston made homestead application * * * for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ SW. Sec. 12, which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1. By departmental decision of March 19, 1910, a hear-

ing was ordered to determine the rights between Thurston and the railway company. At this hearing Small testified that in 1901 he was employed to construct a cabin upon the land by C. C. Cole. Cole sold the cabin before its completion to Dan O'Donnell, who finished it and established residence therein prior to May 9, 1902. O'Donnell also posted a notice of his settlement, but the exact description of the land claimed by him does not appear. O'Donnell testified to his settlement upon the land claimed by Thurston and that he sold whatever rights he had to Thurston in the fall of 1906. Thurston testified that his purchase from O'Donnell was upon October 22, 1906, and that he himself established residence in December, 1906. Thurston stated in his testimony: Q. 'Now, when did you take up your residence on the land?' A. 'That same fall; being a quarter of a mile back from [197] there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.'

"This may, perhaps, refer to the transaction alleged in Beebe's affidavit. As the result of the hearing, Thurston's application was allowed August 23, 1911. He made final proof September 28, 1912, final certificate issuing January 24, 1913, and patent April 29, 1913.

"February 6, 1907, Peter Beebe filed homestead application for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1,

W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which was rejected by the Register and Receiver as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, to the United States, stating therein that he has transferred 'my right and good will to E. R. McPhee.' The relinquishment which had been purchased by McPhee for the sum of \$50.00 was filed September 27, 1909, concurrently with his homestead application. Beebe's application was allowed as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, August 21, 1909 * * * upon which patent was issued April 23, 1915.

"From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under his settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Dibbekk, Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the Department in al-

lowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurston's final proof, which was substantiated by a filed investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and has a house, barn and other improvements valued at \$3,000.00.

"O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the Department without objection from McPhee. *McPhee purchased Beebe's relinquishment after Beebe's application had been rejected*, and failed to file any protest against the allowance of Thurston's entry." (Italics mine.)

The facts as found by the Assistant Commissioner are supported by the testimony in the record. The legal conclusion [198] of the Commissioner as to the fact of residence, and the boundaries of the O'Donnell claim so far as settlement and residence is concerned is erroneous. The cabin was built by Cole and O'Donnell, occupied by O'Donnell, and was upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12, at the time the script was filed; that O'Donnell conveyed his right to his claim, including the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ to Thurston, and that Thurs-

ton conveyed his right to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ to Beebe, is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive, and Thurston testifies that "being a quarter of a mile back from there I drops one forty and takes another forty." The forty that he dropped was the forty that Beebe obtained on which was the cabin. And the forty Thurston took was the forty he got from Beebe. The intent of the occupant O'Donnell in the absence of proof to the contrary is conclusive that it was to enter the land that he occupied, and as the qualifications of Dan O'Donnell as a settler upon public land is absent from the formal application, the department having jurisdiction, opportunity should have been given to supply the qualification as was done in the Thurston case, decision October 25, 1910, in which it is said: " * * * there appears in the record of the proceedings no testimony tending to prove O'Donnell's qualifications to make entry of the land. You will therefore call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses as to his qualifications on May 9, 1902, for consideration with the evidence in the case." This proof in this case was filed by McPhee with his petition. By this privity between O'Donnell and McPhee is established, provided the decision of the Commissioner of July 28, 1909, upon appeal rejecting the application of Peter Beebe for homestead entry upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12 does not intervene. The right of Beebe to the cabin and improvements could be transferred to McPhee not-

withstanding the rejection of his application. There is no proof in the record other than the departmental decision as to the Beebe rejection, but I think the department has a right to [199] judicially known the condition and status of its own records, especially in view of the relation of Beebe, Thurston and McPhee to this record.

By Departmental Decision. Frank et al. vs. Northern Pac. Ry. Co., 37 Land Dec., page 193, and 502 on review, it is held that public land may not be selected under the Act of August 5, 1892, when embraced within a *bona fide* settlement claim. The Supreme Court in St. Paul, M. & M. Ry. Co. vs. Donahue, 210 U. S. 21, held in effect that the right under the Act of August 5, 1892, to select indemnity lands to which no adverse rights or claim had attached or been initiated, does not include land which had been entered in good faith by a homesteader at the time of the supplemental selection, and on a relinquishment being properly filed by the homesteader, the land becomes open for settlement, and the railway under the act is not entitled to the land under a selection filed prior to such relinquishment. There is no question from the record in this case that O'Donnell was a qualified entryman in 1902, and that he had settled upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 with the intention of making a homestead entry; that he transferred this right to Thurston, which included adjoining lands; that Thurston conveyed his right to this forty acres to Beebe, and that at the time the scrip was filed a *bona fide* settlement was initiated. This, however, Beebe failed to estab-

lish. As a matter of law at the time of filing the scrip the Railway Co. had no right by reason of its selection to this land. Did the adjustment of the survey Feb. 23, 1907, validate the railway selection, when Beebe's relinquishment was filed or when his right was adjudicated against him, or was the land open for settlement, and did the settlement and application to enter on the part of McPhee, initiate a right to the land which should upon the record have been allowed by the Land Department?

Upon this issue the parties may present a further brief.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 21, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [200]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. MCPHEE and FRANCES MCPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Decision.

Filed Nov. 9, 1921.

S. M. BRUCE, Attorney for Plaintiffs.

THOMAS BALMER, Solicitor for Gt. Northern
Ry. Co.

CLINTON W. HOWARD, Solicitor for Bel. Bay
Imp. Co.

NETERER, District Judge.—Upon consideration of the supplemental briefs the conclusion must follow that upon the settlement by O'Donnell in 1902 a claim was initiated and attached which reserved the land in issue from operation of lieu selection. Buick vs. Sherman, 93 U. S. 209; Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S. 620; Hastings & P. R. Co. vs. Whitney, 132 U. S. 357; Holton vs. P. M. & M. Co., 17 L. D. 537; and the continuity of interest in the improvements, and settlement upon the land from O'Donnell to McPhee being established, McPhee by his complaint shows a right to the land. N. P. Ry. Co. vs. Trodick, 221 U. S. 508; Osborne vs. Froyesth, 216 U. S. 571; Svor vs. Morris, 227 U. S. 524. The adjustment of the survey did not validate the selection as the land was not open for selection. Kas. P. Ry. Co. vs. Dunmeyer, *supra*. The rejection of Beebe's application is not *res adjudicata* as to the United States. The land being open to entry, McPhee being competent was qualified to assert any right which might be claimed by the United States. [201]

The *mala fides* charged in argument with relation to transfer from Thurston to Beebe, tainting the transaction with fraud, destroying transferable interest, is not established. The intent is clearly established that the purpose was not to procure land for another, but rather to procure the particular land for themselves, and an exchange of improvements and right of occupancy to the particular subdivisions shown is not conduct denounced, as contrary to public policy. *Bailey vs. Sanders*, 228 U. S. 603, and other cases cited are predicated upon a different state of facts, and where the person occupied a wholly different relation than McPhee. The demurrer is overruled.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 10, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [202]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 13—E.

ALBERT R. McPHEE et ux.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Order Overruling Motion to Dismiss.

This cause having been submitted to the Court upon the separate motions of the defendants to dismiss the complaint, and arguments having been heard and briefs submitted, and the Court having heretofore considered the same and filed its written opinion in this cause, it is now by the Court ORDERED, that the said motions to dismiss be, and each of the same are, hereby overruled; to which ruling defendants separately and severally except, which exceptions are allowed.

Defendants are allowed twenty-five (25) days from the filing of this order in which to further plead.

JEREMIAH NETERER,

Judge.

O. K. as to form.

C. W. HOWARD,

For Bellingham Bay Improvement Company.

THOMAS BALMER,

For Great Northern Railway Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 19, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [203]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 13—B.

ALBERT R. MCPHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Answer and Cross-complaint.

The defendants, Great Northern Railway Company and Bellingham Bay Improvement Company, answer the second amended complaint as follows:

I.

They admit that they respectively are corporations doing business in Whatcom County, Wash-

ington. They deny any knowledge or information sufficient to form a belief as to the alleged marital relation of the plaintiffs, and deny each and every other allegation, matter and thing set forth in paragraph I.

II.

They deny paragraph 2, and each and every allegation, matter and thing therein contained.

III.

They admit that in the year 1901 the West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) East, W. M., Whatcom County, Washington, were unsurveyed public lands of the United States, and they deny each and every other allegation, matter and thing contained in paragraph 3. [204]

IV.

They admit that on May 19th, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed in the United States Land Office at Seattle, Washington, its selection list No. 44, describing, among other lands, a tract of land to be described when surveyed as the West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M; admit that said selection list was filed and said land selected and claimed under an act of Congress approved August 5th, 1892 (27 Stat. 390), entitled "An Act for the relief

of settlers on certain lands in the States of North Dakota and South Dakota''; admit that in said selection list said St. Paul, Minneapolis and Manitoba Railway Company represented that said lands were vacant and unappropriated, and were not interdicted mineral nor reserved lands, and were of the character contemplated by said act of August 5th, 1892; deny that they have any knowledge or information sufficient to form a belief as to whether or not said statements were believed by the officers of the Land Department who received said list for filing, and deny each and every other allegation, matter and thing contained in paragraph 4 and not herein specifically admitted.

V.

Answering paragraph 5 defendants admit that a plat of the survey of the township containing said lands was filed in the local land office at Seattle, Washington, on February 6th, 1907, and that on February 23d, 1907, the said St. Paul, Minneapolis and Manitoba Railway Company filed a supplemental selection list, redescribing said lands conformably to the official survey, and deny each and every other allegation, matter and thing contained in paragraph 5. [205]

VI.

Defendants admit that said St. Paul, Minneapolis & Manitoba Railway Company represented to the United States Land Department and the officers thereof in said supplemental selection list that said lands were vacant and unappropriated, and were not interdicted mineral nor reserved lands, and were

of the character contemplated by said act of August 5th, 1892; deny that they have any knowledge or information sufficient to form a belief as to whether or not the officers of the Land Department believed or acted upon said representations, and deny each and every allegation, matter and thing contained in paragraph 6, and not herein specifically admitted.

VII.

Answering paragraph 7 defendants admit that on or about September 27th, 1909, the plaintiff, Albert R. McPhee, made application to enter said lands as a homestead, and that thereafter proceedings were had upon said application in the Land Department of the United States, as shown in Exhibit "A" attached to said second amended complaint. Defendants deny each and every other allegation, matter and thing contained in paragraph 7.

VIII.

Answering paragraph 8 defendants admit that affidavits were submitted to the Land Department and proceedings had in the Land Department, as shown by Exhibit "A" attached to the second amended complaint, and deny each and every other allegation, matter and thing contained in said paragraph.

IX.

Answering paragraph 9 defendants admit that on or about February 6th, 1907, John W. Thurston made application to enter the Southeast quarter of the Southwest quarter (SE. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section [206] One (1), the East half of the Northwest

quarter (E. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northeast quarter of the Southwest quarter (NE. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., as a homestead, and that proceedings were had upon his application in the United States Land Department, as shown by Exhibit "B" attached to the second amended complaint. Defendants further admit that said land described in this paragraph was patented by the United States to the said John W. Thurston. Defendants deny each and every other allegation, matter and thing contained in paragraph 9, except as herein specifically admitted.

X.

Defendants deny each and every allegation, matter and thing contained in paragraph 10.

XI.

Defendants deny each and every allegation, matter and thing contained in paragraph 11.

XII.

Defendants deny each and every allegation, matter and thing contained in paragraph 12.

XIII.

Defendants deny each and every allegation, matter and thing contained in paragraph 13.

XIV.

Answering paragraph 14 defendants admit that on or about the 24th day of July, 1919, the United States of America issued to the defendant Great Northern Railway Company, as successor in interest of the St. Paul, Minneapolis & Manitoba Railway Company, a patent of said West half of the North-

west quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$), [207] Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., and that thereafter said Great Northern Railway Company conveyed to the Bellingham Bay Improvement Company said Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12); admit that under and by virtue of said patent and deed the defendants assert title in fee and the right of possession of the parcels of land respectively owned by them. Defendants deny each and every other allegation, matter and thing contained in paragraph 14.

XV.

Answering paragraph 15 defendants admit that there is valuable timber upon said land, and that defendants assert the right to cut and remove the same at their will. They deny each and every other allegation, matter and thing contained in said paragraph.

For their cross-complaint against plaintiffs, defendants allege:

I.

That the United States of America conveyed to the defendant Great Northern Railway Company by patent July 24th, 1919, the title in fee simple to said West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E. W. M., and that by deed, dated October 17th,

1919, said Great Northern Railway Company conveyed to the defendant Bellingham Bay Improvement Company the title in fee simple to said Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12); that said defendants are respectively the owners in fee simple of said tracts [208] of land; that the plaintiffs assert title thereto as stated in their second amended complaint, but that said claim of title is wholly unfounded both in law and equity, and constitutes a cloud upon the title of these defendants.

WHEREFORE, the defendants pray that the action of the plaintiffs be dismissed, and that said defendants have judgment against the plaintiffs that they, and all persons claiming or to claim by, through or under them, be perpetually debarred and restrained from asserting any right, title or interest in the above described land adverse to the title of the defendants, and that the title of said defendants to the lands respectively owned by them be quieted against the claim of the plaintiffs by decree of this court.

THOMAS BALMER,
EDWIN C. MATTHIAS,

Attorneys for Defendant, Great Northern Railway
Company.

C. W. HOWARD,
Attorney for Defendant, Bellingham Bay Improvement Company. [209]

State of Washington,
County of Whatcom,—ss.

C. M. Smith, being duly sworn on oath states:

That he is Vice-President of Bellingham Bay Improvement Company, one of the above-named defendants; that he has read the foregoing answer and cross-complaint, knows the contents thereof and that the same is true as he verily believes.

C. M. SMITH.

Subscribed and sworn to before me this 10th day of January, 1922.

C. W. HOWARD,

Notary Public in and for the State of Washington,
Residing at Bellingham.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, January 10, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [210]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE et ux.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Answer to Cross-complaint.

The plaintiffs, for answer to the cross-complaint of the defendants herein, admit that the United States conveyed to the defendants the legal title to

the land described in paragraph one of said cross-complaint; but they deny the defendants are the owners in fee simple of said land, and aver the fact to be that said defendants hold the said legal title to said lands in trust for the use and benefit of these plaintiffs, and not otherwise.

Further answering, these defendants allege they are the owners of said real estate and in possession thereof, and are entitled to receive the legal title to said lands conveyed to, and decreed to be in them.

WHEREFORE, they pray judgment as to their complaint, and for their title, and for all full and equitable relief.

S. M. BRUCE,
Attorney for Plaintiffs.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on his oath says: That he is one of the plaintiffs; that he has read the foregoing answer and that the statements therein made are true as he verily believes.

Subscribed and sworn to before me this — day
of February, 1922.

Notary Public, Bellingham, Washington.
Copy received 2/1/22. Verification waived.
THOMAS BALMER, For G. N. Ry. Co.,
C. W. HOWARD, For B. B. I. Co.,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern

Division. March 8, 1922. F. M. Harshberger,
Clerk. By Edith A. Handley, Deputy. [211]

In the United States District Court, for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Statement of Evidence.

BE IT REMEMBERED, That on April 25th, 1922, this cause came on for trial before the Honorable Jeremiah Neterer, District Judge, at Bellingham, Washington, the plaintiffs appearing in person and by S. M. Bruce, their attorney, the defendant Great Northern Railway Company appearing by Thomas Balmer, its attorney, and the defendant Bellingham Bay Improvement Company appearing by C. W. Howard, its attorney, and thereupon the following proceedings were had and evidence given, to wit:

Mr. BRUCE.—After the ruling upon the motions to dismiss an answer and cross-complaint was filed, which puts in issue the basic facts upon which the

plaintiffs' claim rests in point of the occupancy and improvement of the land prior to the location of the scrip by the railroad company, and the proceedings in the Land Office and the disposition of the case there are admitted. So, as I take it, the only facts that come before the Court now are those which go to establish prior rights of occupancy or priority of claim.

Testimony of Alfred Foster Small, for Plaintiffs.

ALFRED FOSTER SMALL, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I have lived in Whatcom County since 1900. In 1901 I was living above Maple Falls. In August of 1901 I did some work for one C. C. Cole on the W. $\frac{1}{2}$ of Section 12, Township 39 North, Range 6 East. The first work I did was to start a wagon road [212] and build a trail going up to the claim and then started to erect cabin. The cabin was located about fourteen rods from the old Galbraith survey line, which would bring it pretty close into the second forty,—either in the southeast corner of the first quarter or the northeast corner of the second quarter. As near as I could judge by the new survey, the cabin would be in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ or the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12. I laid the cabin up three logs high on one side and two, three, four or five logs high on the other. The cabin was habitable in character and fit to live in when completed. I built it for C. C. Cole as a homestead cabin.

(Testimony of Alfred Foster Small.)

The cabin was never completed while Cole had it. He sold his improvements to one by the name of Dan O'Donnell, and I did no work on the cabin after Cole parted with it. The cabin was afterwards completed. I think Herman Steiner completed it. He and O'Donnell worked together some. After it was completed Dan O'Donnell occupied it. He sold his improvements, as near as I can remember, in 1906, and in the meantime he occupied it and made it his home part of the time. He was hauling freight for the Excelsior Mine at the time and he would go up there and stop. Dan O'Donnell is now dead.

Cross-examination.

When I located the cabin it was by the old Galbraith survey and in speaking now of its location I am judging by the way the lines come now. Of course I never measured it exactly. I just went up there and measured the distance by judgment. I did the work for Cole in August and September of 1901. At that time there was no official survey of the land, but just the old Galbraith survey, which was a government survey that was not accepted, as near as I can understand. I speak of the location of the cabin, as near as I can judge, by way of the lines as they are there now, and I am not certain whether the cabin was in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 or SW. $\frac{1}{4}$ NW $\frac{1}{4}$ of 12. It is in either [213] one of the corners of those forties and is pretty close to the line. It would not be a great ways up. In 1909 after the official Government survey I paced it

(Testimony of Alfred Foster Small.)

and made a kind of an estimate of the distance of the old cabin from the north and south center line of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12. (Map, marked Plaintiffs' Exhibit 1, was admitted in evidence.) This map, Plaintiffs' Exhibit 1, shows the S. $\frac{1}{2}$ of Section 1 and all of Section 12, of Township 39 North, Range 6 East. The string of forties in Section 12 on the left hand side of the map are the ones I have been speaking about and the cabin I built was either in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 or the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of that section, and I do not know by the new survey whether the cabin was in one of those forties or the other.

I know the land that McPhee is claiming at the present time. It is the old C. C. Cole home and is described as the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of 12, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of 12, and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 12. The forties that lie just to the east of those were patented to John W. Thurston. I have an idea of where the north and south line runs between the claims of McPhee and Thurston. As near as I can judge of the location of the cabin with reference to the north and south line between the claims of McPhee and Thurston it would be about at the place marked with a cross on Plaintiffs' Exhibit 1, with the name "Cole" above it.

I was living up in that district from the time the cabin was built up to the year 1906. I spent twenty-six days on the trail and the cabin the time that I was working there in the summer of 1901. I was next on the land in 1902, while hunting, and I

(Testimony of Alfred Foster Small.)

stayed overnight where the cabin was. No one was then in the cabin besides myself. The cabin was not completed at that time. That was in the spring of 1902. It would be either in April or May—some-where along that time. It was not a month later than I have stated. It was about the time that the bears were coming out of their holes. I cannot fix the exact time. [214] The cabin was not fully completed and no one was occupying it at that time. I was alone and camped over night alongside of the logs and the shakes. The logs for the walls of the cabin were laid up to a height of about five feet and a half or five feet eight. The roof and the rafters were not on, and the walls were just laid up, forming an open square.

The next time I was on the land was along in the fall or the first of the winter of 1902. I think the month of November. The cabin was then completed. No one was in the cabin at that time.

I think the next time I was on the land was about a year later—along in the fall of 1903. I stayed in the cabin over night at that time. Nobody was living there, but there had been somebody there, because there was canned food there, a bed, a mattress of gunny-sacks and a stove. I think that was my last trip to the cabin until 1909. From 1903 to 1909 I was not at the cabin, but I was across the claim.

I was present at the time of the transfer of the claim from Cole to O'Donnell, but not at the time of the transfer from O'Donnell to Thurston. Cole sold the claim to O'Donnell, as near as I can remem-

(Testimony of Alfred Foster Small.)

ber, in the latter part of October of 1901. They had talked the thing over before that, but I think the transfer was made in the latter part of October.

Redirect Examination.

The little drawing marked Plaintiffs' Exhibit 2 I made by memory in 1909. The forties marked C—C—C are the four forties that Cole held on the east side of Section 1 of the old Galbraith survey. By the new survey those are thrown on the west side of Section 12.

Recross-examination.

I made the map marked Exhibit 2 in 1909. After Thurston went on there I had an idea that I would be called as a witness, so I kind of made that rough sketch for reference. The land [215] that was claimed by Cole, according to the old Galbraith survey, was on the east side of Section 1—I should say Section 11. That would be the four east forties of Section 11. The land that Cole intended to claim was the land over in Section 11, according to the old survey. He had some notices put up showing what he claimed and they described it as the four east forties of Section 11, Township 39, Range 6. One of the notices was on a cedar tree right close to where I built that cabin. This cabin lay in Section 11 by the old survey. There were witness posts and witness trees on the section line, and part of the trail followed the line. I followed the line up. By the old survey the cabin lay in Section 11 on the east side and the four forties of land that Cole claimed lay in Section 11.

(Testimony of Alfred Foster Small.)

I am the same Alfred Small who was called as a witness by John M. Thurston and testified at the Land Office in Seattle in his case. I testified at that hearing that the improvements I built for Cole were on the Thurston claim. He claimed that forty. In his description he claimed the forty that had the cabin. He bought the whole lot off of O'Donnell—that is, his improvements, and then he claimed that forty in his description down there in the Land Office. I know the land that Thurston finally proved up on. It consists of four forties a mile long, north and south, and includes the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 1, the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Section 12 and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12. He dropped a forty that had a prior right on it and took a forty back of that. That is what he did. After we proved a prior right he dropped that. The forty that had the prior right that he first claimed was one of the C. C. Cole forties. At the time I was testifying for him I understood that he was only claiming one forty of what had formerly been claimed by C. C. Cole, and that was the forty that had the cabin on.

Redirect Examination.

When I testified in behalf of Mr. Thurston in the Land Office I understood that he was claiming a part of the C. C. Cole [216] entry. Cole held four forties in a string. One of the notices I spoke of seeing posted was on the south forty, which I call the back forty, because it is back further from the wagon road by which the land is approached on the north. That would be the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 12. I

(Testimony of Alfred Foster Small.)

cannot remember now seeing any notice posted on any of the other forties.

Recross-examination.

When I found the notice just mentioned as being on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, it then purported to be on Section 11 by the old survey, and it referred to Section 11 and not Section 12.

Testimony of Fred Benson, for Plaintiffs.

FRED BENSON, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I am a woods foreman and have lived at Glacier about eighteen years. I am acquainted with the W. $\frac{1}{2}$, Section 12, Township 39, Range 6 East. I was over it in 1904, but found no one living there. There was a cabin and I was in it. I saw the cabin again in 1910 and again in 1918. I have known Mr. McPhee since 1905. In the early part of 1909 he was living around Maple Falls. In 1910 he was living on a homestead that he had taken up in Section 12. He was living about twenty rods northeast of the original cabin that I spoke of. He lived there with his family until about 1917, if I remember.

Cross-examination.

I was not only on the land in 1904, 1910 and 1918, but at other intervals as occasion permitted. In 1910 I saw the same cabin I had seen on the land in 1904, but McPhee was never living in the old

(Testimony of Fred Benson.)

cabin at any time I was there. I do not say that McPhee and his family¹ lived continuously on this land from 1910 to 1917. They came out sometimes in the winter, but were there through the summer almost continuously. While McPhee was living on the land he was cutting shingle bolts on it part of [217] the time. He cleared about one acre and slashed about two. Besides cutting shingle bolts I don't know what he was doing between 1910 and 1917 any more than just any common labor—working around wherever he could find a day's work. He was putting in all his time on the claim besides what he was making his living.

Testimony of Peter Beebe, for Plaintiffs.

PETER BEEBE, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I live at 202 Chestnut Street, Bellingham. In 1906 I was living in Maple Falls. I lived in that neighborhood probably twelve or fourteen years, and made entry of a homestead consisting of two forties in Section 1 and two forties in Section 12. I traded with Jack Thurston and gave him a forty in Section 1 where his house is now, down by the railroad, and I took three forties then in Section 12 in a string. I had the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Section 1, and the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Section 12, and then I traded the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1 and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Section 12, and took three forties in Section 12,

(Testimony of Peter Beebe.)

described as the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Section 12 and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12. Thurston gave me fifty dollars for a place to build his house down at the railroad. After that I took up the land in Section 12 for my homestead and filed on it, in the Land Office. Afterwards I relinquished the three forties in Section 12 to McPhee and proved up on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1. McPhee gave me fifty dollars for the right. There was a cabin on what I gave to McPhee, but I don't know who built it. I didn't see any cabin on any of the other lands that I had. I know the land that Thurston proved up on. I didn't see any cabin on any of those forties. It was five or six years after I made the trade with Thurston that I made the trade with McPhee. I lived there long enough to prove upon the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1. After I relinquished the remainder of my claim to McPhee he built a house on Section 12. I was up there once and McPhee and his wife and two boys were there. I don't know how long they lived there. [218]

Cross-examination.

I haven't lived up in that section of the country since 1911 or 1912. I first took up a homestead in 1907 and at that time the land was officially surveyed. In speaking of these different subdivisions of land I speak of them as they lie according to the accepted survey.

**Testimony of Fred Benson, for Plaintiffs
(Recalled).**

FRED BENSON, recalled as a witness for plaintiffs, testified:

Direct Examination.

It was in August of 1904 that I visited the cabin we have been discussing. It was in fairly good condition and contained a cook-stove, some canned goods, a home-made table, a bunk and a mattress made out of boughs with a gunny-sack over it. From the indications I would say that it had been recently occupied. I saw a notice on the door, the substance of which was that Mr. Dan O'Donnell, if I remember rightly, had taken that for a homestead, and gave the description. I don't remember the exact description it gave that he was taking, but he was taking that as a homestead.

Cross-examination.

I don't know what description of land was claimed by the notice. That was in 1904, before the time of the official survey, and I could not say whether the notice said that O'Donnell claimed land in Section 11 or Section 12.

**Testimony of Alfred Foster Small, for Plaintiffs
(Recalled).**

ALFRED FOSTER SMALL, recalled as a witness for plaintiffs, testified:

Direct Examination.

I spoke this morning of seeing some notices

(Testimony of Alfred Foster Small.)

posted on the land that had been claimed by Cole. One of them was on a cedar tree close to the cabin. It was a C. C. Cole notice, and another one on the south forty was also a C. C. Cole notice. I saw those [219] notices in 1901, and I last saw the remains of them in 1903. They were written on paper pasted on a cardboard and tacked on a tree. The sum and substance of the notices was that he claimed that as his homestead. The description was the NE.1/4 NE.1/4 Section 11 and then it was the four forties following up.

There was a Dan O'Donnell notice on the door which I last saw in 1903. It described that land as his homestead and was signed by D. O'Donnell. I saw that notice on the cabin more than once. O'Donnell and I went up to the cabin together at one time. The house was provisioned and we had something to eat when we were there.

I spoke this morning of having made my home with a man by the name of Headrick, and I saw O'Donnell about there. He was freighting for the Excelsior Mine and he slept up to his cabin. He went up the trail at night after he left the team there at Headrick's place and said he was going to his cabin. At about seven o'clock in the morning he would come down the trail that went up to his cabin.

The land upon which these notices were posted describing it as being in Section 11 was the ground that Cole had posted on and that O'Donnell was occupying. O'Donnell's practice of going up in the

(Testimony of Alfred Foster Small.)

evening to his cabin and coming down in the morning continued about three weeks. He then went to Steiner's and left his team there a while. After he went to Steiner's I would see him sometimes once a week and sometimes once in ten days. He still continued to go up to his cabin to sleep when he was at Steiner's, as he had at Headrick's. I don't know how long that continued at Steiner's. O'Donnell finished building the cabin when I left there and he had a kind of slashing around the cabin. [220]

Cross-examination.

It was in 1901 and 1902 that O'Donnell was freighting for the Mine. It was in 1902 that he went up at night when he was freighting, and I knew of that for about three weeks. So far as his being there when I was also there is concerned, that happened only once. That was in the winter of 1901 and 1902. It was before the cabin was completed. It had a roof on it at that time, but the floor was not all laid.

Testimony of J. H. Cannon, for Plaintiffs.

J. H. CANNON, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I have resided in Maple Falls since 1900 and was acquainted with Dan O'Donnell in his lifetime. I know that in 1902 he was claiming a homestead up in Section 12, as I recollect. I don't know exactly how long he was up there. I met him several times,

(Testimony of J. H. Cannon.)

and in particular I met him one time in April, 1902. He was teaming for the Excelsior Mine and I came down with him. It seems to me that he stopped at Steiner's and he showed me where his trail went up to his homestead. He was around there teaming and one thing and another for a year or two, and he came to Maple Falls, as I recollect, to get his loads to haul them to the Excelsior Mine. He stayed at Steiner's or at Headrick's.

In 1909 or 1910 I was on Mr. McPhee's homestead claim. McPhee was living up there and we went to the cabin that was pointed out to me as the O'Donnell cabin. I cannot say that I saw any notice of postings. McPhee was measuring the lines as to where this cabin was, and as I recall it was the new line. The cabin was on the land that Mr. McPhee claimed according to the new line. I cannot just recall how many rods, but it was several rods in Mr. McPhee's favor. [221]

Cross-examination.

This cabin was on one certain quarter of 12, as I recall, and from my recollection it was between eleven and twelve rods from the south line which came upon Mr. McPhee's land. There was a question in my mind whether the old survey line was in front of it or not, but from my recollection it was, but I am not positive of that.

Redirect Examination.

I know that the survey was shifted. The old line was not in the same place that the new lines were. It seems to me that the old lines were further east.

**Testimony of Albert Raymond McPhee, for
Plaintiffs.**

ALBERT RAYMOND McPHEE, one of the plaintiffs, called and sworn as a witness, testified:

Direct Examination.

I will be forty-seven years of age next June. I live in Glacier and have lived in Whatcom County since October, 1901. I bought a relinquishment from Peter Beebe in the fall of 1909 of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12, and I went on there and built a house and then I done some falling of trees around the house that winter, and my family moved in the first of March. After purchasing the relinquishment, I began work on the house right away. I spent the winter there and hired Mr. Magner to help me. We started the building and built some trails. There was a cabin on the land fifteen or twenty rods above my house towards the west. I know where the Government lines were run by the last survey, and that cabin is on the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$. It is not very far over the north line of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 and it is close to thirty rods west of the line between me and Mr. Thurston. When I went up there and took possession of the ground the old cabin was in pretty fair shape. There were some boards off of one gable end, but aside from that it was in habitable condition. I had a couple of shingle bolt cutters that were cutting [222] bolts up there for me, living in it. They batched in it and then I used it for other purposes afterwards. The following

(Testimony of Albert Raymond McPhee.)

March I moved my family up to my present cabin. We stayed there until 1917 or 1918. I used to go away and work in the summer time and my wife used to work as a cook in the winter time while I was staying home on the homestead. I cleared about three acres, and my object in taking possession was for a homestead. I am a citizen of the United States. My furniture and part of my cooking utensils are still in the house. In February, 1918, we went down to Fobes to work and I left the bed and everything there because I used to go up and put in the garden, and then after the railroad company had got a patent to it I had whatever ground I had plowed up and seeded in oats and then after I got the oats I seeded it down and let clover and grass grow on it.

Testimony of Mrs. Hannah Kline, for Plaintiffs.

Mrs. HANNAH KLINE, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I live at Deming. Dan O'Donnell was my oldest brother. He died on the 28th day of February, 1920, at the age of forty years. In 1901 and 1902 and 1903 he was working at the Mines up there doing teaming. He claimed a homestead up there. I would not be certain about the time. I don't know the description of the ground. He and my father were born in Ireland. My father was a naturalized citizen. He took up a homestead thirty-six years ago.

(Testimony of Mrs. Hannah Kline.)

Cross-examination.

The family home while my brother Daniel was a man in his early twenties was at Lawrence, Washington, twelve miles out of Bellingham and four miles this side of Deming. At the time that my brother had his homestead claim he made his home practically with us week-ends and he worked at the mines there for a time. I don't just remember how long, because I wasn't home there all the time. He did not at any time go and live for any considerable [223] period on his homestead, but made his home with his father and the remainder of the family at his father's home. I don't know where he voted that certain year, but I know that he always did vote at Lawrence when we were living in Lawrence. Our family moved to Lawrence in January, 1900, and lived there for nine years, and during that time my brother made that place his home. It is with reference to those nine years that I spoke of knowing where he was accustomed to vote, and during those years, so far as I know, he voted at Lawrence. He was never gone from home to make his home away from the family home for any length of time during that period. He would go away to work, but he never went away to make his home away from home. My brother was not married until just a year or two before his death.

Redirect Examination.

I know that my brother did claim a homestead up there by Maple Falls. He always talked of coming home or being at home with his parents as long

(Testimony of Mrs. Hannah Kline.)

as he lived, and he always spoke of his parents' home as being his home.

I would not say for sure how many times he voted at Lawrence, but I know that he used to go and vote occasionally. I would not say whether he voted at every election or not. I just have in mind that he did vote there at Lawrence.

Recross-examination.

I cannot say for certain how long my brother spoke of claiming this homestead, but I believe it was something like a year. He didn't speak of claiming it for a period as long as four or five years. He gave it up about a year after he first claimed it. I was too young to understand very much about it at the time, but I remember he and father talking about it when the scrip was put on the land up there and father told him that he didn't think there was any use in fighting it, that he might just as well give it up, so he didn't bother with it any more. After that conversation he made no effort to hold a homestead. [224]

Redirect Examination.

This conversation was something about a scrip. Up to that time he claimed it as a homestead, and after the railroad placed the scrip there he became discouraged.

Re-recross-examination.

I know father never encouraged him on the homestead. It was so far from home and he didn't feel like staying there like he should, and all I can be

(Testimony of Mrs. Fannie McPhee.)

sure father said was, "Now there is no use trying to fight the scrip. You might just as well give it up." That is all that I can remember about it.

Testimony of Mrs. Fannie McPhee, for Plaintiffs.

Mrs. FANNIE MCPHEE, one of the plaintiffs, called and sworn as a witness, testified:

Direct Examination.

We moved upon our homestead in 1910. Our family consisted of three children and my husband and myself. Mr. McPhee first went up there to build in the fall of 1909. I was then running the cook-house for Mr. Thurston at Warnick and moved up to the claim in the spring of 1910. We were there until 1917. Of course I was not there steady. I was away at work at times and my husband was there those times. Our purpose in going up was to make it a homestead. We moved part of our furniture out of the place about four years ago, but enough is left so that we can always go up there and live.

Mr. BRUCE.—I wish to introduce in evidence the exhibits attached to the second amended complaint.

The COURT.—Very well.

(Whereupon the documents referred to were introduced in evidence as Exhibits "A" and "B.")

Mr. BRUCE.—If your Honor please, before finally resting, if it should become important I have a stipulation with counsel that the naturalization

papers of Mr. O'Donnell may be furnished later.
Plaintiffs rest. [225]

DEFENDANTS' CASE.

Mr. BALMER.—The defendants offer in evidence a certified copy from the United States General Land Office of the St. Paul, Minneapolis and Manitoba Railway Company's selection list number forty-four.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "A.")

Mr. BALMER.—The defendants offer in evidence as their exhibit "B," a certified copy from the United States General Land Office at the St. Paul, Minneapolis and Manitoba Railway Company's selection list number forty-four A.

The COURT.—That will be admitted.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "B.")

Mr. BALMER.—The defendants offer in evidence as their exhibit "C" a certified copy from the General Land Office of clear list number forty-three of the Great Northern Railway Company, successor of the St. Paul, Minneapolis and Manitoba Railway Company, in so far as it relates to certain lands shown in the list.

The COURT.—It may be admitted.

Mr. BALMER.—Including the lands in controversy here.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "C.")

Mr. BALMER.—The defendants offer in evidence as their exhibit “D” a certified copy of the patent from the United States of America to the Great Northern Railway Company to the land in controversy in this case, and other lands.

The COURT.—It will be admitted.

(Whereupon document referred to was admitted in evidence as Defendants’ Exhibit “D.”) [226]

Mr. BALMER.—The defendants offer in evidence as their exhibit “E” a certified copy from the office of the United States Surveyor General for Washington of the plat of Township 39 North of Range 6 East of the Willamette Meridian.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendant’s Exhibit “E.”)

Mr. BALMER.—The defendants offer as their exhibit “F” a certified copy from the same Surveyor General Office of the field-notes of the survey of Section 12, Township 39 North of Range 6 East of the Willamette Meridian.

Mr. BRUCE.—No objection.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendants’ Exhibit “F.”)

Mr. BALMER.—The defendants offer in evidence as their exhibit “G” a copy of the Mount Baker Quadrangle of the United States Geological Survey, and in connection with that a copy of the adjoining quadrangle of the same survey. The reason for offering the two is that the first, which includes the land in controversy, is drawn on a small scale

and it does not have the Government division lines extended. It is necessary therefore to read it in connection with the adjoining quadrangle which has the survey lines on it extended.

Mr. BRUCE.—To that I object as being immaterial. They have now the Surveyor General's field-notes.

The COURT.—It may be filed, and I will reserve the ruling on that.

Mr. BALMER.—Those are official publications, your Honor.

The COURT.—Well, these may be admitted.

(Whereupon documents referred to were admitted in evidence as Defendants' Exhibit "G" and "H," respectively.) [227]

Testimony of Alex Stewart for Defendants.

ALEX STEWART, called and sworn as a witness for defendants, testified:

Direct Examination.

I am employed in the Engineering Department of the Great Northern Railway Company, and am the author of the map marked Plaintiffs' Exhibit 1. The contour lines on that map are from the United States Geological Survey maps that have been introduced in evidence as Defendants' Exhibits "G" and "H." The subdivision lines and the creeks are from the township map. I visited the land in controversy a week ago to-day. There was a cedar shake cabin that I noticed and then there was one that had fallen down further west. The collapsed cabin was four hundred and twenty-seven

(Testimony of Alex Stewart.)

feet in a southwesterly direction from the standing cabin. I examined in connection with the official government survey and in connection with the field notes of the survey of Section 12. I have observed the references in those field-notes to the destruction of the old monuments. According to the old survey the old cabin would have been in Section 11. It would be a question whether it would be in the southeast or the northeast forty of the northeast quarter of Section 11. According to the old survey the east line of Section 11 was moved approximately eight hundred twenty-five feet in that particular corner. That would be offhand from fifty to fifty-five rods. I have indicated on Plaintiffs' Exhibit 1 the location of the old corner of Sections 1, 2, 11 and 12 of Township 39. Although the lines would not be precisely parallel in a general way the relationship of the corners will be substantially the same, so that there would be a similar change in the location of the other corners of Section 12.

Testimony of David Russell, for Defendants.

DAVID RUSSELL, called and sworn as a witness for defendants, testified: [228]

Direct Examination.

I live at Hamilton, Skagit County, Washington. My business is a cruiser. I am sixty-seven years old. I selected land in Section 12, Township 39 North, Range 6 East, for the St. Paul, Minneapolis and Manitoba Railway Company. I was employed by G. B. Peavey, and I selected vacant land on the

(Testimony of David Russell.)

old survey. I selected the lands which are described as the $W.1\frac{1}{2}$ NW. $1\frac{1}{4}$, Section 12, and NW. $1\frac{1}{4}$ SW. $1\frac{1}{4}$, Section 12, Township 39, Range 6. At that time there was a survey in that country different from the final accepted government survey. I selected the land described some time the last of April or along about the first of May, 1902. Thomas Thompson was with me in doing the work. The northerly end of this land is close to the road and close to the Nooksack River. We started our work from the north and first located the northwest corner of Section 12. From that point we went east twenty rods along the section line and then worked south to the section line on the south of 12. I checked my compassman on the quarter post to see how his bearing was with the Government survey, and then we would go on through to the section corner and check that. In that way we ran south on a line parallel to and twenty rods from the west line of Section 12 until we got to the south line of the section, and then we went forty rods and came back through that same row of forties twenty rods from the east line of it and sixty rods from the west line. The object of working through the land in that way was to split each twenty acres and have ten acres on each side of the compassman to estimate. There are four tallies across the forty. The tally would be twenty rods. When we got down ten rods I would stop there and kind of figure the timber. When he called the first tally I would

(Testimony of David Russell.)

mark that down and go on to the next. That was our system of estimating at that time.

Working south on the first line through Section 12, when we came to a point opposite the quarter post we would pace back [229] to the quarter post, so that I could see if my compassman had about the same bearing that the section line was running on and how he was pacing out. We did the same thing when we came to a point opposite the section corner. We went over to the monuments and when we came to those marked corners or quarter posts we examined them for notices. Also as we were running along our course we took observations of trails or improvements. If there were improvements there I made a note of it. If I would strike a trail I would investigate and would go out that trail to the section line to see if there were any improvements along the trail. While I was doing that work I selected no land on which I found improvements or a cabin. My instructions from Mr. Peavey were to pass up all claims of forties that had improvements on, and where they had their notices posted on the cabin why I was to pass up the claim—whatever the notice described. In my examination of these three forties I found no evidence of occupation by anyone and no cabin or improvements of any kind; nor do I remember of any notices being there. We would do the work of cruising that land in a day. We were on an eager lookout for improvements while doing the

(Testimony of David Russell.)

work and our object was to avoid land on which there were improvements, so as to avoid conflicts.

Cross-examination.

I was paid by the day, and not according to the stumpage I located. I started from the northwest corner of Section 12, according to the old survey, and then ran east along the north line twenty rods, then south parallel to the west line, then east forty rods and came back. As nearly as I could I followed a direct compass line to the south boundary of the section, and every forty rods I stopped and went around and took in what would probably equal an acre of ground and counted the trees. I would then average the five acres by that. When I had accomplished that task my work was done so far as that particular ground was [230] concerned, except making out my reports and sending them in.

Testimony of Thomas Thompson, for Defendants.

THOMAS THOMPSON, called and sworn as a witness for defendants, testified:

Direct Examination.

I am a deputy forest supervisor in the United States Forest Service. I have been employed in that department eighteen years. I assisted David Russell in the work he did in locating land in Section 12, as he has testified. I was running the compass for him, and corroborate the testimony that has been given by Mr. Russell.

(Testimony of Thomas Thompson.)

Cross-examination.

When we were doing this work we were camped at several different places up there.

Testimony of Garry B. Peavey, for Defendants.

GARRY B. PEAVEY, called and sworn as a witness for defendants, testified:

Direct Examination.

I live at Seattle and my business for a number of years past has been timber lands and lumber. I have been in the timber land business in the State of Washington thirty-two years and a half, and followed the same line of business in the east before coming out here. In the year 1902 I was engaged by the St. Paul, Minneapolis and Manitoba Railway Company to select land in lieu of the lands that they lost when they built the road up the Red River of the North. I employed David Russell in that work and I filed most of the selection lists of the land that was chosen for the Railway Company in Seattle Land Office.

Referring to the certified photographic copy of Great Northern selection list No. 44 (Defendants' Exhibit "A"), I will state that that list was prepared and filed by me. The bold handwriting is mine and covers what was on the list when I filed it. The fine handwriting and notations were not on the list when I filed it. My instructions to Mr. Russell with reference to [231] the selection of lands were to go out and examine all the vacant unoccupied land and not to have anything to do

Testimony of John W. Thurston.)

with any that had cabins on it. I myself never went over the land in controversy.

Testimony of John W. Thurston, for Defendants.

JOHN W. THURSTON, called and sworn as a witness for defendants, testified:

Direct Examination.

My present residence is in Bellingham. I lived from 1906 to 1917 on a homestead in Section 12, Township 39, Range 6. There were four forties lying north and south, one in Section 1 and the other three in Section 12. I obtained a patent of that land from the Government. I started to build in December 1906 and left there in the fall of 1917, and raised my family right there. I was familiar prior to 1917 with the land now claimed by Mr. McPhee, adjoining my homestead on the west. To reach that land one goes right straight up through my place direct south of the road. Mr. McPhee was working for me before he took up his claim. Mr. McPhee and his family went there in the spring of 1910. In the summer-time they were up there all the time until about 1912 or 1913. They were only there a couple of years, and then the place was deserted for a year or two, and then they moved back once in 1915 for the summer only.

Testimony of Mrs. Lena Thurston, for Defendants.

Mrs. LENA THURSTON, called and sworn as a witness for defendants, testified:

Direct Examination.

I am the wife of John W. Thurston. Our homestead near Glacier in Section 12, Township 39, Range 6, adjoins the land that is claimed by Mr. McPhee. I remember that McPhee bought Beebe out in 1909. We lived on our claim from 1909 to 1917. People going to and from the McPhee place crossed our homestead. McPhee's lived there a good deal of the time in 1909, and then they were off and on that place most of the time until 1915, and from that time on I have no knowledge of them living on the place [232] at all, because the road was always blocked. When we would be going up there in the summer-time to pick berries the road was always blocked with windfalls and brush and everything, and we had to go around the trail.

Cross-examination.

I think it was in 1909 that McPhee's first moved up there and they were on their claim that entire summer. I never was inside the McPhee house, but I have been close to it. I was not on visiting terms with the McPhees and there was trouble between our families.

Defendants rest.

Testimony of Albert Raymond McPhee, for Plaintiff (Recalled—In Rebuttal.)

ALBERT RAYMOND MCPHEE, one of the plaintiffs, recalled as a witness on rebuttal, testified:

Direct Examination.

The house I built on my homestead was fourteen by fifteen and I also built a chicken-coop about twenty-five feet long and twelve feet wide, and a root house about fourteen feet square. I planted eighteen orchard trees which commenced to bear in the summer of 1915. I stayed on my homestead until the summer of 1914. In the summer of 1913 Mr. Christie logged Thurston's claim and I worked for him, because all I had to do was to just go down from my house to Thurston's claim and when the day was over I could go right home. In the summer of 1914, after I had put in my garden truck, I went to work for Mr. Polson in the coal mine, and I worked there in the summer of 1914 and the winter of 1915, and I got hurt and was in the hospital for about two months. My wife was down there taking care of me and my two boys and girls stayed there on the place all that winter. That was in 1915. In the summer of 1916 I worked on the railroad section, so that I could get up home over night. When I was [233] working out that way it was for the purpose of getting money to sustain my family. I used to work on my homestead after working hours. I kept chickens and a cow on the place and a nice bunch of turkeys one sum-

(Testimony of Albert Raymond McPhee.)

mer. After I went on that place I never maintained a home any other place than there, and I was at no time absent for a period of three or six months.

Cross-examination.

I never left that place more than three months at a time after establishing my residence, unless I was working some place and didn't get home. My family was there when I was working at the coal mine. This old cabin that is supposed to have been occupied by O'Donnell is the cabin that is broken down now. It was made of split cedar logs and lied a few rods back of my house, or to the west. The roof broke in about two years ago. I think one side of the roof was smashed in with snow. When the bolt cutters were batching in there the pipe caught fire and burned the rafters a little and when the heavy snow came on that side broke in. That is the O'Donnell cabin.

Testimony closed.

Mr. BALMER.—Defendants at the close of all the evidence in the case move to dismiss the action, upon the ground that the evidence fails to establish the cause of action set forth in the second amended complaint, or any cause of action, and totally fails to show that plaintiffs are entitled to any equitable relief.

The COURT.—That will be taken under advisement with the balance of the matter. [234]

Certificate of Judge Approving Statement of Evidence.

The defendants having on the 30th day of October, 1922, lodged the foregoing statement of evidence with the Clerk of the above-entitled court, and notified the plaintiffs of such lodgment, and having given the plaintiffs ten days' notice of the time and place when they would ask the Court to approve said statement, and said statement being now, at the time and place stated in said notice, presented to the Court and no objections made and amendments proposed by any party, and said statement being found by the Court true, complete and properly prepared, the same is hereby approved, settled and allowed as a true and complete statement of the evidence, and is directed to be filed in the Clerk's office and become a part of the record for the purposes of appeal.

Done in open court this 10th day of November, 1922.

JEREMIAH NETERER,

District Judge.

The foregoing statement of evidence having been settled and approved by the Court, it is hereby engrossed by the party proposing it.

THOMAS BALMER,

Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,

Solicitor for Bellingham Bay Improvement Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. October 30, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy.

[Endorsed]: Refiled in the United States District Court, Western District of Washington, Northern Division. November 10, 1922, as Settled by the Court. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [235]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RY. CO., a Corporation,
and BELLINGHAM BAY IMPROVE-
MENT CO., a Corporation.

Decision.

Filed September 7, 1922.

THOMAS BALMER and CLINTON HOWARD,
Attorneys for Defendants.

S. M. BRUCE, Attorney for Plaintiff.

NETERER, D. J.—I have read the briefs and examined the record and have in mind the testimony of the witnesses at the time of the trial, and I am

convinced by the evidence that the plaintiffs have sustained the fact contended for in the bill of complaint, and my view of the law having heretofore been expressed in opinions filed a decree may be presented in favor of the complainants as prayed for.

NETERER,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. September 7, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [236]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,

Defendants.

Decree.

This cause having been heretofore submitted to the Court for judgment, evidence having been taken and counsel heard, and the Court having duly considered the same and being fully advised, does find

that all the allegations of the complaint are true and fully proven, and it is now ORDERED, ADJUDGED AND DECREED by the Court that plaintiffs are the owners and in possession of the following described lands and tenements, to wit:

The West half of the Northwest Quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section Twelve (12) Township Thirty-nine (39) North in Range Six (6) East of W. M. in Whatcom County, Washington.

That the defendants hold the legal title to such lands in trust for the plaintiffs whose right to the said title are superior and prior to the defendants, and said title is now and hereby directed to be and is vested in the plaintiffs Albert R. McPhee and Frances McPhee free of any and all claims of the defendants and either of them or those claiming by, through or under them.

It is further DECREED AND ADJUDGED that plaintiffs have judgment for their costs herein accrued and to accrue in the sum of \$62.90 dollars, to be taxed by the clerk of this Court. [237] All of which is finally ordered, adjudged and decreed.

This day of 3d, 1922.

JEREMIAH NETERER,
Judge.

Copy rec'd Sept. 26, 1922.

C. W. HOWARD,
For B. B. I. Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, October 3, 1922. F. M. Harshberger,
Clerk. By Edith A. Handley, Deputy. [238]

In the United States District Court for the West-
ern District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

The above-named defendants, feeling themselves
aggrieved by the decree in favor of the plaintiffs
made and entered in this cause on the third day of
October, 1922, do hereby appeal from said decree
to the Circuit Court of Appeals of the United States
for the Ninth Circuit, for the reasons specified in
the assignment of errors, which is filed herewith.
The said defendants pray that their appeal be al-
lowed and that citation issue, as provided by law,
and that a transcript of the record, proceedings
and papers upon which said decree was based, duly
authenticated, may be sent to the United States Cir-
cuit Court of Appeals for the Ninth Circuit.

And the defendants, desiring to supersede the execution of the decree, here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

THOMAS BALMER,
Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Improvement Com-
pany. [239]

Order Allowing Appeal.

The appeal is allowed and shall operate as a supersedeas upon the petitioner's filing a bond in the sum of five hundred dollars (\$500.00), with sufficient sureties to be conditioned as required by law.

Done in open court this 14th day of November, 1922.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [240]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,
Defendants.

Assignment of Errors.

NOW COME the Great Northern Railway Company, a corporation, and Bellingham Bay Improvement Company, a corporation, defendants and appellants in the above-entitled cause, and make and file the following assignment of errors:

I.

The District Court erred in overruling the separate motions of the defendants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

II.

The District Court erred in making and entering its final decree, dated October 3d, 1922, adjudging that the defendants hold the legal title to the lands in controversy in trust for the plaintiffs, and quieting the title of the plaintiffs to said lands against

the claims of the defendants and those claiming under them.

III.

The District Court erred in refusing to enter a decree quieting the title of the defendants to the lands respectively claimed and held by them against the claim of the plaintiffs, as [241] prayed in the defendants' cross-complaint.

IV.

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

V.

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or

power of the District Court to re-examine or determine in this suit.

VI.

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company. [242]

VII.

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

VIII.

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the plaintiff, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by plaintiffs or their predecessors, as public lands under the homestead laws.

IX.

The District Court erred in refusing to hold and

decide that the adjudication of the United States Land Department against the claim of the plaintiff's predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the plaintiffs, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the plaintiffs under the homestead laws.

X.

The District Court erred in holding and deciding upon all the evidence in the case that the plaintiffs were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW. $\frac{1}{4}$ NW. $\frac{1}{4}$) [243] of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show that any of the other land in controversy was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the Railway Company.

XI.

The District Court erred in refusing to hold and decide that in no event could the plaintiffs prevail as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the

plaintiffs at the time of the filing of the Railway Company's selection list.

Dated this 14th day of November, 1922.

THOMAS BALMER,
Solicitor for Defendant, Great Northern Railway
Company.

CLINTON W. HOWARD,
Solicitor for Defendant, Bellingham Bay Improve-
ment Company.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. November 14, 1922. F. M. Harshberger,
Clerk. By Edith A. Handley, Deputy. [244]

In the United States District Court for the West-
ern District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, Great Northern Railway Company, a cor-
poration of the State of Minnesota, and Bellingham

Bay Improvement Company, a corporation of the State of Washington, as principals, and National Surety Company, a corporation of the State of New York, licensed to act as surety in the State of Washington, acknowledge ourselves to be jointly and severally indebted to Albert R. McPhee and Frances McPhee, husband and wife, plaintiffs in the above-entitled suit, in the sum of Five Hundred and No/100 Dollars (\$500.00), for the payment of which well and truly to be made, we bind ourselves, and our, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of November, 1922.

Upon the condition, nevertheless, that:

WHEREAS, on the third day of October, 1922, in the District Court of the United States, for the Western District of Washington, Northern Division, in a suit depending in that court, wherein the said Albert R. McPhee and Frances McPhee, husband and wife, are plaintiffs, and the said Great Northern Railway Company and Bellingham Bay Improvement Company are defendants, numbered on the Equity Docket as No. 13—E, a decree was rendered in favor of the said plaintiffs and against the said defendants, and the said [245] defendants having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Albert R. McPhee and Frances McPhee, citing and admonishing them to be and ap-

pear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California, on the 14th day of December, A. D. 1922, next.

Now, if the said Great Northern Railway Company and Bellingham Bay Improvement Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY.

By THOMAS BALMER,
Its Solicitor.

BELLINGHAM. BAY IMPROVEMENT
COMPANY.

By CLINTON W. HOWARD,
Its Solicitor.

NATIONAL SURETY COMPANY.

By _____,
Resident Vice-President.
J. GRANT,
Resident Assistant Secretary.

The foregoing bond and the surety thereon is hereby approved this 14th day of November, 1922.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [246]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE, and FRANCES McPHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and BELLINGHAM BAY IMPROVEMENT COMPANY, a Corporation, Defendants.

Citation.

The President of the United States of America, to Albert R. McPhee and Frances McPhee, Husband and Wife, GREETING:

YOU ARE HEREBY NOTIFIED, That in a certain case in equity in the United States District Court in and for the Western District of Washington, Northern Division, wherein you, the said Albert R. McPhee and Frances McPhee are complainants, and Great Northern Railway Company, a corporation, and Bellingham Bay Improvement Company, a corporation, are defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at the city of San Francisco in the State of California thirty

days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 14th day of November, A. D. 1922.

JEREMIAH NETERER,
United States District Judge.

Due and timely service of the foregoing citation is hereby acknowledged at Bellingham, Washington, this 15th day of November, 1922.

S. M. BRUCE,
Solicitors for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 16, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [247]

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, and Bellingham Bay Improvement Company, a Corporation, Appellants, vs. Albert R. McPhee and Frances McPhee, Appellees. Transcript of Record. Upon Appeal from the United States District

Court for the Western District of Washington,
Northern Division.

Filed December 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Appellants,

vs.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Appellees.

**Statement of Errors on Which Appellants Will Rely
and Designation of Parts of the Record Neces-
sary for the Consideration Thereof.**

To the Clerk of the Above-entitled Court, to the Ap-
pellees Above Named, and to S. M. Bruce, Esq.,
Solicitor for Appellees:

Please take notice that the appellants in the
above-entitled cause intend to rely upon the follow-
ing errors committed by the United States District

Court for the Western District of Washington,
Northern Division:

ERROR No. I.

The District Court erred in overruling the separate motions of the appellants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

ERROR No. II.

The District Court erred in making and entering its final decree, dated October 3d, 1922, adjudging that the appellants hold the legal title to the lands in controversy in trust for the appellees, and quieting the title of the appellees to said lands against the claims of the appellants and those claiming under them.

ERROR No. III.

The District Court erred in refusing to enter a decree quieting the title of the appellants to the lands respectively claimed and held by them against the claim of the appellees, as prayed in the appellants' cross-complaint.

ERROR No. IV.

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land

Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

ERROR No. V.

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

ERROR No. VI.

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company.

ERROR No. VII.

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

ERROR No. VIII.

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the appellees, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by appellees or their predecessors, as public lands under the homestead laws.

ERROR No. IX.

The District Court erred in refusing to hold and decide that the adjudication of the United States Land Department against the claim of the appellees' predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the appellees, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the appellees under the homestead laws.

ERROR No. X.

The District Court erred in holding and deciding upon all the evidence in the case that the appellees were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW. $\frac{1}{4}$ NW. $\frac{1}{4}$) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show, that any of the other land in controversy

was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the railway company.

ERROR No. XI.

The District Court erred in refusing to hold and decide that in no event could the appellees prevail as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as a part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the appellees at the time of the filing of the railway company's selection list.

For the consideration of said errors by the United States Circuit Court of Appeals for the Ninth Circuit, appellants think the following parts of the record necessary, to wit:

Designation of Document.	Page No. of Original Certi- fied Record Where Docu- ment Appears.
1. Second amended complaint, including Exhibits "A" and "B" attached thereto and by reference made a part thereof	21 to 192
2. Separate motion of Great Northern Railway Company to dismiss.....	193
3. Separate motion of Bellingham Bay Improvement Company to dismiss.	194
4. Opinion of the District Court, filed July 19, 1921.....	195 to 200

Designation of Document.	Page No. of Original Certi- fied Record Where Docu- ment Appears.
5. Opinion of District Court, filed No-	
vember 9, 1921.....	201 to 202
6. Order overruling motions to dismiss	203
7. Answer and cross-complaint.....	204 to 210
8. Answer to cross-complaint.....	211
9. Statement of evidence.....	212 to 235
10. Decision filed September 7th, 1922..	236
11. Decree entered October 3d, 1922....	237 to 238
12. Petition for appeal and allowance	
thereof.....	239 to 240
13. Assignment of errors.....	241 to 244
14. Appeal and supersedeas bond.....	245 to 246
15. Citation and proof of service.....	247
	Original transmitted
16. Plaintiffs' Exhibit 1	by Order of the
(Not to be printed)	District Court.
17. Plaintiffs' Exhibit 2	
(Not to be printed)	“ “ “
18. Defendants' Exhibit "A"	“ “ “
19. Defendants' Exhibit "B"	“ “ “
20. Defendants' Exhibit "C"	“ “ “
21. Defendants' Exhibit "D"	“ “ “
21. Defendants' Exhibit "E"	“ “ “
22. Defendants' Exhibit "F"	“ “ “
23. Defendants' Exhibit "G"	
(Not to be printed)	“ “ “
24. Defendants' Exhibit "H"	
(Not to be printed)	“ “ “

Dated this 7th day of December, 1922.

THOMAS BALMER,

Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,

Solicitor for Bellingham Bay Improvement Company.

The appellees acknowledge due and timely service of the within and foregoing statement of errors and designation of parts of the record necessary for the consideration thereof by the receipt of true copy thereof at Bellingham, Washington, this 11th day of December, 1922, and hereby stipulate that only those parts of the record designated in the foregoing statement shall be printed.

S. M. BRUCE,

Solicitor for Appellees.

[Endorsed]: No. 3952. In the United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, and Bellingham Bay Improvement Company, a Corporation, Appellants, vs. Albert R. McPhee and Frances McPhee, Appellees. Statement of Errors on Which Appellants Will Rely and Designation of Parts of the Record Necessary for the Consideration Thereof. Filed Dec. 15, 1922. F. D. Monckton, Clerk.

Defendants' Exhibit "A."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

"B"

J. E. P.

#13—E.

4—207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed copy of St. Paul, Minneapolis & Manitoba Railway Company Selection List No. 44, Seattle, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed by name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. PARROTT,

Acting Assistant Commissioner of the General Land Office.

01653

1994 2002 2007

List No. *W.W. (01653)*

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May 7

As follows, to-wit:

Sept 22, 1915 - Geological Survey of Dept. of Ag. " 11.0 " " 25+ J.R.

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sent to education and 3/2/59 25

Class

972100-2

SELECTIONS

IN LIEU OF

North of Base Line and East
The Willamette Principal Meridian Seattle
Land District, State of Washington

North of Base Line and East—
The Willamette Principal Meridian Seattle
Land District, State of Washington

PARTS OF SECTION

251C.

TOWN RANGE:

ACRIS

PARTS OF SECTION

5.

1991

5311

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Survived will be

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13 - Sep 16 E - City. 143 miles road.





972100—4

State of Minnesota,
County of Ramsey,—ss.

I, Thos. R. Benton, being duly sworn, depose and say that I am the land agent of The St. Paul, Minneapolis and Manitoba Railway Company, that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said The St. Paul, Minneapolis and Manitoba Railway Company as enuring to it, under the Act of Congress, entitled "An Act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," approved August 5th, 1892, that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the said Act.

THOS. R. BENTON,

Sworn and subscribed before me this 22d day of
March, 1902.

[Seal]

WALTER T. LEMON,

Notary Public, Ramsey County, Minnesota.

UNITED STATES LAND OFFICE,

Seattle, Washington.

May 9th, 1902.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the St. Paul, Minneapolis and Manitoba Railway Company, under the grant to the said Company, by Act of Congress approved August 5th, 1892, entitled "An Act for the relief of settlers upon

certain lands in the states of North Dakota and South Dakota," and selected by said The St. Paul, Minneapolis and Manitoba Railway Company by Thomas R. Benton, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we fully certify that the filing of said list is allowed and approved, and that the whole of said lands are unsurveyed public lands of the United States, and that the same are not, nor is any part thereof classified and returned as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or of record in this office.

We further certify that the foregoing list shows that an assessment of the fees payable to us, allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices, and that the said Company have paid to the undersigned, the Receiver, the full sum of Eight Dollars, in full payment and discharge of said fees.

EDWARD P. TREMPER,

Register.

Receiver.

Defendants' Exhibit "B."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monekton, Clerk.

"B"

J. E. P.

#13—E.

4—207

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed copy of St. Paul, Minneapolis & Manitoba Railway Company Selection List No. 44-A, Seattle, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. PARROTT,

Acting Assistant Commissioner of the General Land Office.

Original

C1623

LAND DEPARTMENT

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

LIST NO 44^{C16} Supplemental to List No 44

STATE OF

Washington

U. S. LAND OFFICE at

Seattle

February 15 1907

The ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, under and by virtue of the Act of Congress, entitled, "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5th, 1892, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands, claimed by said Company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location and construction of the line of route of the Railway of said Company, the selections being particularly described as follows, to wit:

Noted in North Dakota and Washington

April 22 1907

North of Base Line and West of Fifth Principal Meridian,
State of North Dakota.

1. 1. 1. } App-Application 02/13/2
2. 2. 2. } inv 02/13 finally in.
3. 3. 3. } jctra 6017" jany 2/14/07

Thos. Q. Benton
Selecting Agent



46—972100—7

State of Minnesota,
County of Ramsey,—ss.

I, Thos. R. Benton, being duly sworn, depose and say, that I am the land agent for the St. Paul, Minneapolis and Manitoba Railway Company, that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said The St. Paul, Minneapolis and Manitoba Railway Company as enuring to it, under the act of Congress, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5th, 1892, that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the said Act.

THOS. R. BENTON.

Sworn and subscribed before me this 18th day of February, 1907.

[Seal]

JAMES STODDART,

Notary Public, Ramsey County, Minnesota.

My commission expires June 21st, 1911.

UNITED STATES LAND OFFICE,
Seattle, Washington.

Feb'y 23d, 1907.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by The St. Paul, Minneapolis and Manitoba Railway Company, under the grant to the said Company, by Act of Congress approved August 5th,

1892, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," and selected by said The St. Paul, Minneapolis and Manitoba Railway Company by Thos. R. Benton, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof classified and returned as mineral land or lands, nor claimed as swamp lands, nor is there any prior homestead, pre-emption, State or other valid claim to any portion of said lands on file or of record in this office.

We further certify that the foregoing list shows that an assessment of the fees payable to us, allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices, and that the said Company have paid to the undersigned, the Receiver, the full sum of (Fees paid May 9th 1902 List No. 44) Dollars, in full payment and discharge of said fees.

J. HENRY SMITH,
Register.

FRANK A. TWICHELL,
Receiver.

Defendants' Exhibit "C."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

"B"

J. E. P.

#13—E

4—207

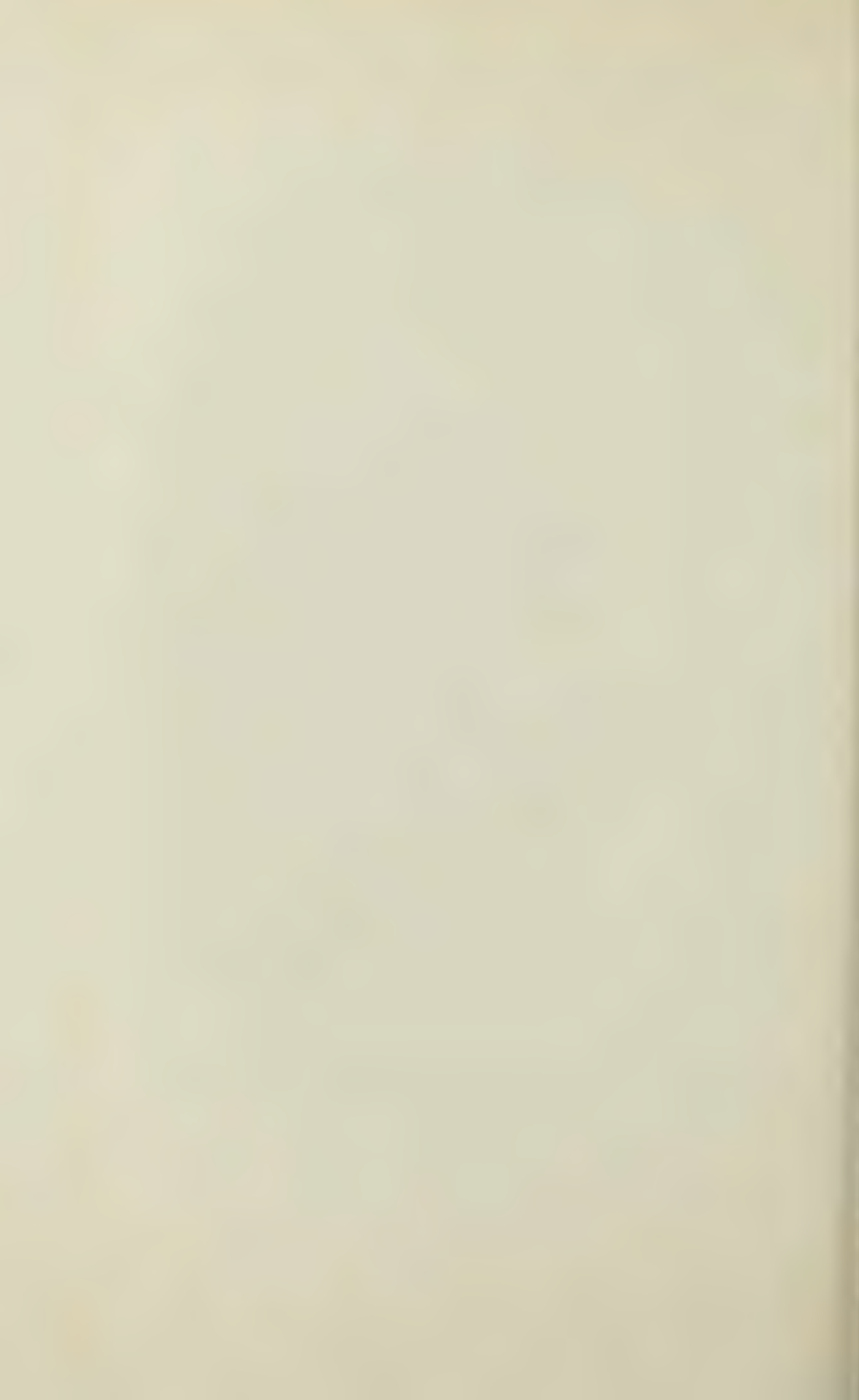
DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed extract copy of Clear List No. 43, Great Northern Railway Company, successor to St. Paul M. & M. Railway Co., so far as it relates to the lands therein shown, is a true and literal exemplification from the said list on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. PARROTT,
Acting Assistant Commissioner of the General Land
Office.



Clean List #43

Washington

Great Northern Railway Company
 Summ. to

St Paul M & M Ry Co

Act of Aug. 5, 1892
 27 Stat. 390

Seattle Land District

file 15
 x # 39

4-19-19 to James F. Maher, Land Comm. Great Northern
 Ry Company, St Paul Minn for \$524.72 Survey fees
 J.F.M.

5-5-19 Survey fees paid \$524.72 See 845865 & Confirmation
 by Dir. "M" ~~845865~~ and Duplicate Certificate of Deposit #340
 transmitted by letter 847954 J.F.M.

7-31-19 to James F. Maher Land Comm. St Paul Minn.
 for \$324 Conveyance fees J.F.M.

8-4-19 to R.R. Seattle transmuting list of lands
 patented 5942

PATENT No. 700321
 July 21, 1919

B' LIST 589
 29.

11/11/19 Paired in H.D. 700321

972100-b

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.

March 29, 1919.

WHEREAS, under rulings of the General Land Office the extension into Dakota Territory, now the States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad owned by the St. Paul, Minneapolis and Manitoba Railway Company was denied and in consequence of such rulings, lands within the limits of said grants in said States have been claimed, settled upon, occupied and improved by numerous persons in good faith under color of title or of right to do so, derived from the various laws of the United States relating to the public domain and are now claimed by them, their heirs or assigns; and

WHEREAS, under subsequent construction of said grants, the said occupants, improvers or purchasers were liable to be evicted from their holdings; and

WHEREAS, by Act of Congress approved August 5, 1892 (27 Stat. 390), the Secretary of the Interior was directed to cause to be prepared and delivered to said railway company a list of the tracts which have been purchased, claimed and occupied and improved as set forth therein and provided that after the receipt of said list the railway company should execute under its corporate seal and deliver to the Secretary of the Interior a deed of

conveyance releasing said lands to the United States and should procure, and cause to be released to the United States all claims and liens thereon derived through it; and

WHEREAS, said company upon the execution and procurement of the release aforesaid was authorized to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of the actual Government survey which has been or shall be made, of the United States, not reserved and to which no adverse right or claim shall have attached

Patent No. 700321

July 24, 1919.

'B' List 589
972100-c

or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs," in lieu of the released tracts which shall not include any lands within the limits of the grant to aid in the construction of the St. Vincent Branch of the road as located under the Act of March 3, 1871, upon which any person had, in good faith, settled and made or acquired valuable improvements prior to March, eighteen hundred and seventy-seven; and

WHEREAS, there has been filed in and accepted by the Department of the Interior, evidence showing that the Great Northern Railway Company is the lawful successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company and entitled to receive patent for all lands earned by

the latter company, the ultimate title to which remains in the United States; and

WHEREAS, the following described lands have been selected by the duly authorized agent of the company, under the Act of August 5, 1892, and the lands given as the basis therefor have been duly released and conveyed to the United States in conformity with the requirements of said act,

Patent No. 700321

July 24, 1919.

North of base line and East of Willamette Meridian.

WASHINGTON.

GREAT NORTHERN RAILWAY LIST.

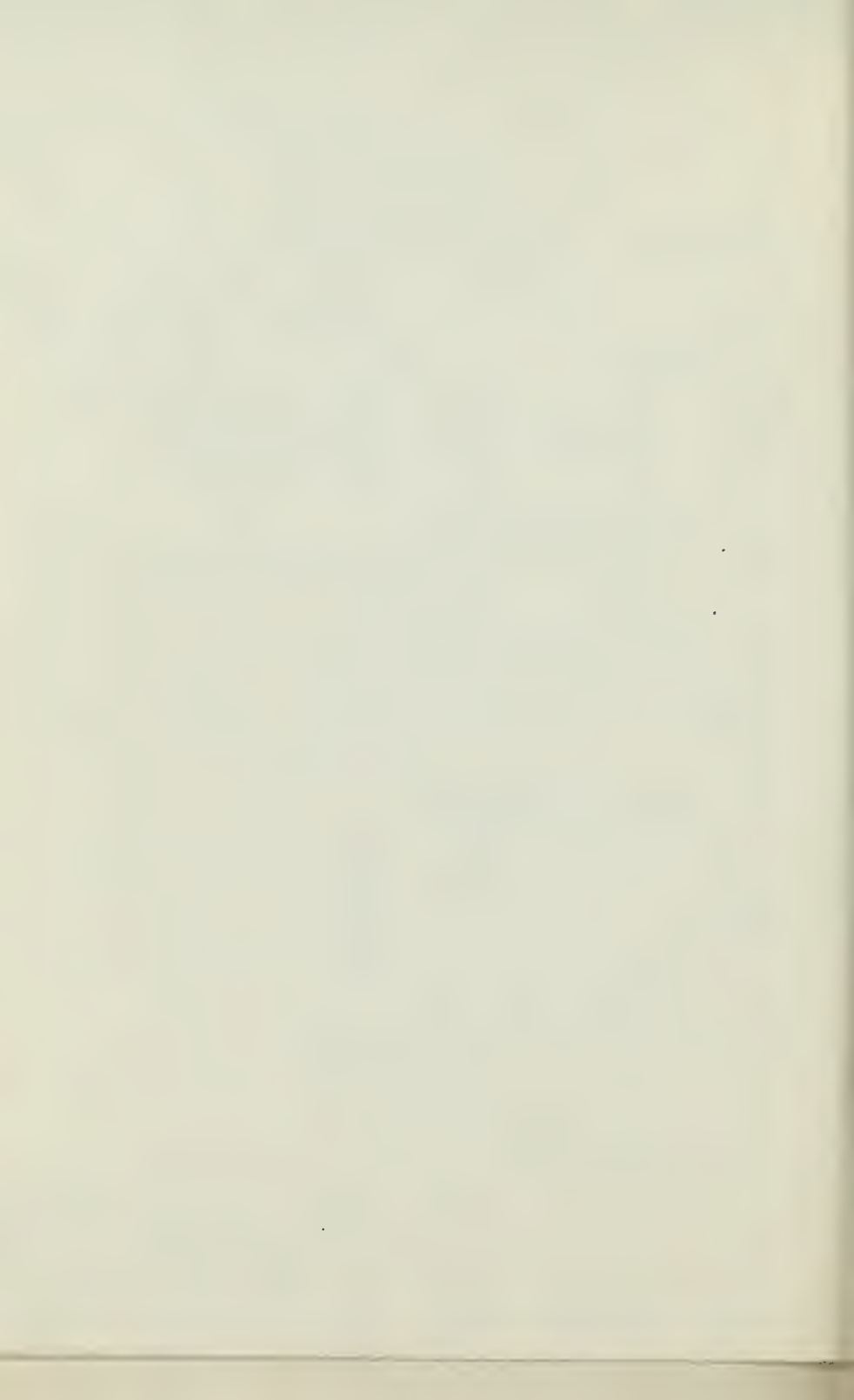
Indemnity

Act August 5, 1892
(27 Stat. 390).

Parts of Section.	Sec.	T.	R.	Acres		Parts of Section.	Sec.	T.	R.	Acres
<u>Seattle</u>		N.	E.			<u>North Dakota</u>		N.	W. 5th P.M.	
List 48 & 48 D (01756) June 3, 1902. ✓ and June 30, 1913.										
					In lieu of					
Lot 4	21	36	5	39.70	"	NE $\frac{1}{4}$ SE $\frac{1}{4}$	35	150	50	40.00
Lot 5	21	36	5	39.50	"	SE $\frac{1}{4}$ SE $\frac{1}{4}$	35	150	50	40.00
Lot 12	21	36	5	39.25	"	NW $\frac{1}{4}$ SE $\frac{1}{4}$	35	150	50	40.00
Lot 13	21	36	5	38.90	"	SW $\frac{1}{4}$ SE $\frac{1}{4}$	35	150	50	40.00
List 46 & 46 A (0262) May 19, 1902 ✓ and February 18, 1917.										
Lot 3 NE $\frac{1}{4}$ SW $\frac{1}{4}$	24	39	5	81.97	"	E $\frac{1}{2}$ SE $\frac{1}{4}$	19	130	47	80.00
List 47 & 47 A (0263) May 26, 1902 ✓ and February 23, 1907.										
Lot 4 SE $\frac{1}{4}$ SW $\frac{1}{4}$	24	39	5	82.66	"	S $\frac{1}{2}$ SE $\frac{1}{4}$	1	130	48	80.00
List 58 & 58 C (02993) August 9, 1902 ✓ and November 2, 1916.										
Lot 6	23	37	6	38.72	"	SW $\frac{1}{4}$ NW $\frac{1}{4}$	3	130	47	40.00
Lot 4	26	37	6	38.85	"	NW $\frac{1}{4}$ NE $\frac{1}{4}$	13	130	48	40.00
Lot 5	26	37	6	38.72	"	SW $\frac{1}{4}$ NE $\frac{1}{4}$	13	130	48	40.00
List 49 & 49 B (01632) June 14, 1902 ✓ and February 23, 1912.										
SW $\frac{1}{4}$ NE $\frac{1}{4}$	2	38	6	40.00	"	NE $\frac{1}{4}$ NE $\frac{1}{4}$	3	130	48	39.74

PATENT NO 700321
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Parts of Section.	Sec.	T.	R.	Acres		Parts of Section.	Sec.	T.	R.	Acres
Seattle		N.	E.			North Dakota		N. W.	5th P.M.	
List 49 Cont'd.					In lieu of					
S $\frac{1}{2}$ NW $\frac{1}{4}$	2.	38	6	80.00		S $\frac{1}{2}$ NE $\frac{1}{4}$	3	130	48	80.00
SE SW $\frac{1}{4}$	3	38	6	40.00	"	NW $\frac{1}{4}$ NE $\frac{1}{4}$	3	130	48	39.70
SW SW $\frac{1}{4}$	11	38	6	40.00	"	NE $\frac{1}{4}$ SE $\frac{1}{4}$	5	130	48	40.00
List 48 & 48 B (01756) June 3, 1902 and February 23, 1912.										
SE NW $\frac{1}{4}$	17	38	6	40.00	"	NE $\frac{1}{4}$ NE $\frac{1}{4}$	17	147	49	40.00
List 49 & 49 A (01639) June 14, 1902 and February 23, 1907.										
NW SW $\frac{1}{4}$	28	38	6	40.00	"	NE $\frac{1}{4}$ SW $\frac{1}{4}$	5	130	48	40.00
E $\frac{1}{2}$ SE $\frac{1}{4}$	11	39	6	80.00	"	W $\frac{1}{2}$ SW $\frac{1}{4}$	5	130	48	80.00
List 44 & 44 A (01653) May 9, 1902 and February 23, 1907.										
S $\frac{1}{2}$ NE	12	39	6	80.00	"	E $\frac{1}{2}$ NE $\frac{1}{4}$	29	130	47	80.00
W $\frac{1}{2}$ NW	12	39	5	80.00	"	W $\frac{1}{2}$ SE $\frac{1}{4}$	29	130	47	80.00
NW SW $\frac{1}{4}$, SW SW $\frac{1}{4}$, SE $\frac{1}{4}$	12	39	6	240.00	"	NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$	29	130	47	240.00
List 44 & 44 B (02446) May 9, 1902 and October 1, 1912.										
NW NW $\frac{1}{4}$	13	39	6	40.00	"	NW $\frac{1}{4}$ NE $\frac{1}{4}$	29	130	47	40.00
List 47 & 47 B (0200) June 11, 1904 and January 14, 1913.										
Lot 3	2	31	7	43.19	"	NE SW $\frac{1}{4}$	5	131	47	40.00
Lot 4	2	31	7	42.62	"	NW SW $\frac{1}{4}$	5	131	47	40.00
Lot 5	2	31	7	80.00	"	S $\frac{1}{2}$ SW	5	131	47	80.00
Lot 6	2	31	7	160.00	"	NE $\frac{1}{4}$	33	149	49	160.00
Lot 1	3	31	7	42.04	"	SE NE $\frac{1}{4}$	1	149	50	40.00
Lot 2	3	31	7	40.00	"	SW NE $\frac{1}{4}$	1	149	50	40.00
Lot 3	3	31	7	80.00	"	W $\frac{1}{2}$ SW	17	149	49	80.00



972100-f

LAND GRANTS DIVISION.

March 29, 1919.

IT IS HEREBY CERTIFIED that the foregoing list has been examined in connection with the plats and records of this office and the selected tracts therein described are vacant and unappro-
successor in interest to St. Paul, Minneapolis and
patent to the Great Northern Railway Company,
successor in interest to St. Paul, Minneapolis and
Manitoba Railway Company, under the Act of Au-
gust 5, 1892 (27 Stat. 390), and the tracts specified
as bases for the tracts selected have been duly re-
leased by the proper parties in interest, in accord-
ance with the provisions of the aforesaid Act and
the releases accepted by the Department and the
said tracts have not heretofore been used as bases
for any approved selections.

45,063.84

It is further certified that (42,143.60) of the 65,000
acres, which under the act can be selected, have
heretofore been patented to the Company, none of
which has subsequently been reconveyd to the
United States Government, leaving a balance of
19,936.16

(22,856.40) acres subject to selection under the pro-
visions of the aforesaid act.

Certification is further made that said selected
tracts were not returned as mineral, and have been
reported on by the Geological Survey and Special
Agents of this office as containing no valuable de-

posits of coal or other minerals and as having no power-site or reservoir possibilities.

JNO. H. DORRIS,
Examiner.

Approved:

G. B. DRIESBOCK,
Chief of Division.

Patent No. 700321

972100-g

July 24, 1919

W. B. C.

NOW, THEREFORE, as it has been found upon a careful examination of the foregoing list of selections in connection with the records of the General Land Office, that the said selections, in so far as said records show, are free from conflict and the tracts given as bases therefor have been duly released and conveyed to the United States by the St. Paul, Minneapolis and Manitoba Railway Company and the releases accepted by the Secretary of the Interior, it is hereby recommended that the selected tracts, covering two thousand, seven hundred and sixty acres and twenty-four hundredths of an acre, be approved and carried into patent as lands inuring to the Great Northern Railway Company, under the Act of August 5, 1892 (27 Stat. 390), successors in interest to the St. Paul, Minneapolis and Manitoba Railway Company as aforesaid, the patent to contain a reservation in accordance with the proviso to the Act of August 30, 1890 (26 Stat. 391).

Commissioner.

To the Honorable

Secretary of the Interior.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

May 27, 1919.

Approved: embracing two thousand, seven hundred and sixty acres and twenty-four hundredths of an acre.

ALEXANDER T. VOGELSANG,

First Assistant Secretary of the Interior.

JWW

GWM

Patent No. 700321

July 24, 1919

'B' List 589

HSH

Defendants' Exhibit "D."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monekton, Clerk.

#13—E

No. 224525.

UNITED STATES

To

GREAT NORTHERN RAILWAY COMPANY.

PATENT.

Patent No. 39.

Great Northern Railway Company.

Successor to the

St. Paul, Minneapolis and Manitoba Railway Company.

Act August 5, 1892.

No. 700321.

Seattle Land District, Washington.

4—1043.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come,
GREETING:

WHEREAS under the rulings of the General Land Office the extension into Dakota Territory, now the States of North Dakota and South Dakota, of the limits of the grants of lands made by Congress to aid in the construction of the several lines of railroad owned by the St. Paul, Minneapolis and Manitoba Railway Company, was denied and in consequence of such rulings, lands within the limits of said grants in said States have been claimed, settled upon, occupied and improved by numerous persons in good faith under color of title or of right to do so, derived from the various laws of the United States relating to the public domain and are now claimed by them, their heirs or assigns; and,

WHEREAS, under subsequent construction of said grants, the said occupants, improvers or purchasers were liable to be evicted from their holdings; and

WHEREAS, by Act of Congress approved August 5, 1892 (27 Stat. 390), the Secretary of the Interior was directed to cause to be prepared and delivered to said railway company a list of the tracts which had been purchased, claimed and occupied and improved as set forth therein and provided that after the receipt of said list the railway company should execute under its corporate

seal and deliver to the Secretary of the Interior a deed of conveyance, releasing said lands to the United States, and should procure, and cause to be released to the United States all claims and liens thereon derived through it; and

WHEREAS, said company upon the execution and procurement of the release aforesaid was authorized to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of the actual Government survey which has been or shall be made, of the United State—, not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into which the railway owned by said railway company runs," in lieu of the released tracts which shall not include any lands within the limits of the grant to aid in the construction of the St. Vincent Branch of the road as located under the Act of March 3, 1871, upon which any person had in good faith, settled and made or acquired valuable improvements prior to March, eighteen hundred and seventy-seven; and

WHEREAS, there has been filed in and accepted by the Department of the Interior, evidence showing that the Great Northern Railway Company, is the lawful successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company and entitled to receive patent for all lands earned by the latter company, the ultimate title to which remains in the United States; and

WHEREAS, the following described lands have

been selected by the duly authorized agent of the company, under the Act of August 5, 1892, and the lands given as the bases therefor have been duly released and conveyed to the United States in conformity with the requirements of said Act, viz.:

WILLAMETTE MERIDIAN, WASHINGTON.

Township thirty-six, north of Range five east; the Lots four, five, twelve and thirteen of Section twenty-one; Township thirty-nine north of Range five east; the Lots three and four, the northeast quarter of the southwest quarter and the southeast quarter of the southwest quarter of section twenty-four.

Township thirty-seven north of Range six east.

The Lot six of Section twenty-three and the Lots four and five of Section twenty-six.

Township thirty-eight north of Range six east; the southwest quarter of the northeast quarter and the south half of the northwest quarter of section two, the southeast quarter of the southwest quarter of section three, the southwest quarter of the southwest quarter of Section eleven, the southeast quarter of the northwest quarter of Section seventeen and the northwest quarter of the southwest quarter of section twenty-eight.

Township thirty-nine north of Range six east.

The east half of the southeast quarter of Section eleven, the south half of the northeast quarter, the west half of the northwest quarter and the northwest quarter of the southwest quarter, the southwest quarter, of the southwest quarter and the

southeast quarter of section twelve and the northwest quarter of the northwest quarter of section thirteen.

Township thirty-one north of Range seven east.

The lots three and four, the south half of the northwest quarter and the southwest quarter of Section two and the Lot one, the southeast quarter of the northeast quarter and the east half of the southeast quarter of Section three.

Township thirty-two north of Range seven east.

The Lot six and the northwest quarter of the southwest quarter of Section twenty-two, the southwest quarter of the northwest quarter of Section twenty-seven and the northeast quarter of the northeast quarter of Section twenty-eight.

Township thirty-five north of Range seven east.

The southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of Section twenty-five.

Township twenty-seven north of Range eight east.

The Lot eight of Section one.

Township thirty-three north of Range nine east.

The west half of the northeast quarter and the Lots one and two of Section twenty-four.

Township thirty-two north of Range ten east.

The Lot five of Section eight, the north half of the northeast quarter, the south half of the southeast quarter, the Lot one, the south half of the northeast quarter and the southeast quarter of the northwest quarter of Section nine and the Lots

five, six, seven, ten, eleven and twelve of Section seventeen.

Containing in the aggregate, two thousand seven hundred sixty and twenty-four hundredths acres.

NOW KNOW YE, that the United States of America, in consideration of the premises, and pursuant to the said Act of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the Great Northern Railway Company successor in interest to the St. Paul, Minneapolis and Manitoba Railway Company, and to its assigns, the tracts of land selected as aforesaid and described in the foregoing; TO HAVE AND TO HOLD the said tracts with the appurtenances thereof, unto the Great Northern Railway Company, successor as aforesaid, and to its successors and assigns, forever. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, WOODROW WILSON, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-fourth day of July, in the year of our Lord one thousand nine hundred and nineteen,

and of the Independence of the United States, the one hundred and forty-fourth.

By the President: WOODROW WILSON,
By E. D. BOULDIN,
Assistant Secretary.
L. Q. C. LAMAR,
Recorder of the General Land Office.

[United States General Land Office.]

Recorded: Patent Number 700321.

Patent No. 39, July 24, 1919.

WHATCOM COUNTY.

Description.	Section.	Township.	Range.	Acres.
Lot 3	24	39	5	41.97
" 4	"	"	"	42.66
NE. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	40.
SE. $\frac{1}{4}$ SW. $\frac{1}{4}$	"	"	"	40.
Lot 6	23	37	6	38.72
Lots 4, 5	26	"	"	77.57
SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ S. $\frac{1}{2}$ NW. $\frac{1}{4}$	2	38	6	120.
SE. $\frac{1}{4}$ SW. $\frac{1}{4}$	3	"	"	40.
SW. $\frac{1}{4}$ SW. $\frac{1}{4}$	11	"	"	40.
SE. $\frac{1}{4}$ NW. $\frac{1}{4}$	17	"	"	40.
NW. $\frac{1}{4}$ SW. $\frac{1}{4}$	28	"	"	40.
E. $\frac{1}{2}$ SE. $\frac{1}{4}$	11	39	6	80.
S. $\frac{1}{2}$ NE. $\frac{1}{4}$ W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$				
SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$	12	"	"	400.
NW. $\frac{1}{4}$ NW. $\frac{1}{4}$	13	"	"	40.

Patent No. 39, July 24, 1919.

SKAGIT COUNTY.

Description.	Section.	Township.	Range.	Acres.
Lot 4	21	36	5	39.70
" 5	"	"	"	39.50
" 12	"	"	"	39.25
" 13	"	"	"	38.90
SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$	25	35	7	80.
W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Lots 1 and 2	24	33	9	187.93
				<hr/> 425.28

Received for Record at 8:30 A. M., Dec. 15, A. D. 1919, and recorded at request of James T. Maher.

J. A. MILLER,

County Auditor, Whatcom Co., Wn.

Recorded Vol. 3 Patents, page 536.

State of Washington,
County of Whatcom,—ss.

I, Sam E. Barrett, County Auditor and ex-officio Recorder of Deeds in and for Whatcom County, State of Washington, hereby certify that the annexed and foregoing is a true and correct copy of Patent from United States to Great Northern Railway Company, #224525, as the same appears of record, on page 536 of Volume 3 of Patent Records of said County.

WITNESS my hand and official seal this 5 day of April, A. D. 1922.

[Seal]

SAM E. BARRETT,

County Auditor in and for Whatcom County, State of Washington.

By L. E. King,
Deputy.

No. 224525. Certified Copy of Patent—United States to Gr. Northern Ry. Co. Prepared at the request of Gt. Northern Ry. Co. Received for Record at 8:30 A. M. Dec. 15, A. D. 1919, and recorded at request of James T. Maher. J. A. Miller, County Auditor Whatcom Co., Wn. Sam E. Barrett, Auditor of Whatcom County, Washington.

\$2.40.

Defendants' Exhibit "E."

#13—E.

4—699.

DEPARTMENT OF THE INTERIOR.

OFFICE OF U. S. SURVEYOR GENERAL.

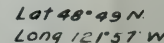
Olympia, Washington, April 3, 1922.

I, Clair Hunt, U. S. Surveyor General for Washington, do hereby certify that the annexed blueprint of the plat of the survey of Township 39 North, Range 6 East of the Willamette Meridian, is a true and literal exemplification of said plat now on file in this office.

[Seal]

CLAIR HUNT,
United States Surveyor General for Washington.





Area Public Land	18339.38
" Water Surface	<u>126.25</u>
Total	18465.63

The above map of T 39 N., R 6 E., WM was approved by the Surveyor General for Washington Sept 29, 1906 and was accepted by Commissioner's letter "E" dated Nov 27, 1906

NO. 3952
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
DEC 12 1922
F. D. MONCKTON,
CLERK.

13-E
Left Ex "E"

Defendants' Exhibit "F."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

#13—E.

(1)

Certified Copy.

FIELD-NOTES OF THE SURVEY OF SEC. 12,
Tp. 39 N., R. 6 E.

(East line of section 12.)

Begin at the cor. of secs. 7, 12, 13 and 18, which is a sandstone, 24x18x10 ins. 18 ins. in the ground, for cor. of secs. 7, 12, 13 and 18, marked with 4 notches on S. and 2 on N. edges, from which brs,

A hemlock 12 ins. dia. N. 47° E. 51 lks. dist.

mkd. T. 39 N. R. 7 E. S. 7 B. T.

A hemlock 10 ins. dia. S. $48\frac{1}{2}^{\circ}$ E. 31 lks. dist.

mkd. T. 39 N. R. 7 E. S. 18 B. T.

A hemlock 12 ins. dia. S. 61° W. 4 lks. Dist.

mkd. T. 39 N. 6 E. S. 13 B. T.

A hemlock 12 ins. dia. N. $13\frac{1}{2}^{\circ}$ W. 58 lks. dist.

mkd. T. 39 N. R. 6 E. S. 12 B. T.

(Thence I run.)

North bet. secs. 7 and 12.

Through heavy timber and dense undergrowth.

Descend N. slope over rolling ground.

- 21.50 Pony trail, brs, NE. & SW.
- 32.19 Old $\frac{1}{4}$ sec. cor. bears E. 12.50 chs. dist. I
destroy old cor. and marks on bearing
trees.
- 39.86 A fir 40 ins. dia. on line, I mark with 2
notches on N. and S. sides.
- 40.00 Set a hemlock post, 3 ft. long, 4 ins. sq.,
24 ins. in the ground, for $\frac{1}{4}$ sec. cor.
marked $\frac{1}{4}$ S. 12 on W. and 7 on E. face,
from which brs,
A hemlock, 5 ins. dia. S. $82\frac{1}{2}^{\circ}$ E. 19 lks.
dist.
mkd. $\frac{1}{4}$ S. 7 B. T.
A hemlock 5 ins. dia. N. 80° W. $16\frac{1}{2}$ lks.
dist.
mkd. $\frac{1}{4}$ S. 12 B. T.
- 41.00 Stream 3 lks. wide, course N. 60° E. and
foot of descent 650 ft. below cor. Thence
over rolling bench through old burn.
- 49.00. Begin descent, brs. E. & W.
- 56.50 Begin descent on steep slope, bears NW. &
SE.
- 57.68 A fir 26 ins. dia. on line, I mark with 2
notches on N. and S. sides.
- '61.89 A fir 36 ins. dia. on line, I mark with 2
notches on N. and S. sides.

(2)

Section 12, Tp. 39 N., R. 6 E., W. M.

- 62.00 At this point a creek 30 lks. wide, 50 lks.
E. of line, flows N. 10° E. from S. 30° E.

63.00 Foot of descent, bears E. & W., 200 ft. below top.

Thence over level bottom.

66.17 To right bank of creek, 25 lks. wide, course E., from S. 80° W. join first creek 30 lks. E. of line.

Leave burn.

66.43 To left bank of creek.

69.93 To left bank of creek, 50 lks wide, course N. 30° W.

70.50 To right bank of creek.

71.56 Old sec. cor. bears E. 13.90 chs. dist. I destroy cor. and marks on bearing trees.

71.85 To right bank of same creek, course N. 20° E., and S. 20° W.

72.50 To left bank of same creek, course N. 20° E.

74.30 To left bank of same creek, course N. 20° W. from S. 20° E.

76.00 To right bank of same creek, course N. 20° E. from S. 20° E. and leave bank.

77.00 To left bank of same creek, course N. 20° E. from S. 20° W.

77.50 Trail, bears NE. & SW.

80.00 Set a granite stone 20x12x8 ins. 15 ins. in the ground, for cor. to secs. 1, 6, 7 and 12, marked with 5 notches on S. and 1 on N. edges, from which bears,

A hemlock 9 ins. dia. N. $49\frac{1}{2}^{\circ}$ E. 62 lks. dist. mkd. T. 39 N. R. 7 E. S. 6 B. T.

An alder 12 ins. dia. S. $19\frac{1}{2}^{\circ}$ E. 26 lks. dist. mkd. T. 39 N. R. 7 E. S. 7 B. T.

An alder 12 ins. dia. S. $321\frac{1}{2}^{\circ}$ W. 18 lks. dist.
mkd. T. 39 N. R. 6 E. S. 12 B. T.

An alder 5 ins. dia. N. 35° W. 25 lks. dist.
mkd. T. 39 N. R. 6 E. S. 1 B. T.

Land rolling.

Soil, gravelly loam, 3d and 4th rate.

Timber, hemlock, fir, cedar, white fir, alder,
maple and cottonwood. Undergrowth, the
same with huckleberry, salmonberry, devil
club and vine maple.

Heavily timbered land and land covered
with dense undergrowth, 80.00 chs. July
28, 1905.

(3)

Section 12, Tp. 39 N. R. 6 E., W. M.

(South line of Sec. 12).

From the cor. to secs. 7, 12, 13 and 18,
on the east bdy. of the Tp.

Thence I run.

S. $89^{\circ} 59'$ W. on a true line bet. secs. 12
and 13.

Through heavy timber and dense under-
growth.

Along N. slope.

- 1.45 A cedar 40 ins. dia. on line, I mark with 2
notches on E. and W. sides.
- 2.00 Enter old burn, bears NE. & SW.
- 22.00 Begin steep descent, brs, NE. & SW.
- 27.92 Old $\frac{1}{4}$ sec. cor., bears S. 6.65 chs. dist.
I destroy cor. and marks on bearing trees.

- 30.00 Stream 4 lks. wide, course N. 50° W., foot of descent, 150 ft. below top, and leave burn, brs. NW. & SE.
- 31.75 Stream 10 lks. wide, course N. 60° W.
Thence over rolling ground.
- 40.05 Set a sandstone, 16x10x6 ins. 12 ins. in the ground, for $\frac{1}{4}$ sec. cor., marked $\frac{1}{4}$ on N. face, from which bears,
A hemlock 30 ins. dia. N. $53\frac{1}{2}^{\circ}$ E. 60 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.
A cedar 12 ins. dia. S. $19\frac{1}{2}^{\circ}$ W. 39 lks. dist.
mkd. $\frac{1}{4}$ S. 13 B. T.
- 43.42 Begin steep descent brs. NE. & SW.
- 44.86 To right bank of creek, 20 lks wide, course N. and foot of descent 100 ft. below top.
- 45.07 To left bank of creek, and begin steep ascent, brs. E. & W.
- 45.90 Top of steep ascent, 60 ft. above creek, and begin descent, bears NE. & SW.
- 51.00 To right bank of creek, 30 lks. wide, course N. 75° E. and foot of descent, 60 ft. below top.
- 51.78 To left bank of creek, and begin steep ascent, bears NE. & SW.
- 66.80 Old sec. cor., bears S. 6. 30 chs. dist., I destroy cor. and marks on bearing trees.
- 69.00 Summit of steep ascent, bears NE. & SW.
500 ft. above foot, and begin gradual ascent, bears NE. & SW.

(4)

Section 12, Tp. 39 N., R. 6 E., W. M.

80.10 Set a fir post, 3 ft. long, 5 ins. sq., 24 ins. in the ground, for cor. to secs. 11, 12, 13 and 14, marked.

T. 39 N. S. 12 on NE.,

R. 6 E. S. 13 on SE.,

S. 14 on SW. and

S. 11 on NW. faces, with 4 notches on S. and 1 on E. edges, from which bears,

A hemlock, 10 ins. dia. N. $15\frac{1}{2}^{\circ}$ E. 46 lks. dist.

mkd. T. 39 N. R. 6 E. S. 12 B. T.

A hemlock 10 ins. dia. S. 55° E. 35 lks. dist.

mkd. T. 39 N. R. 6 E. S. 13 B. T.

A fir balsam 12 ins. dia. S. 43° W. 44 lks. dist.

mkd. T. 39 N. R. 6 E. S. 14 B. T.

A hemlock 10 ins. dia. N. 46° W. 18 lks. dist.

mkd. T. 39 N. R. 6 E. S. 11 B. T.

Land rough and rolling.

Soil, gravelly loam, 3d and 4th rate.

Timber hemlock, fir, cedar, larch, fir, balsam and white fir.

Undergrowth, the same with huckleberry, salmonberry, devil club and vine maple.

Heavily timbered land and land covered with dense undergrowth, 80.10 chs.

(West line of Section 12.)

From the cor. of secs. 11, 12, 13 and 14 (cor. above) N. $0^{\circ} 01'$ W. bet. secs. 11 and 12.

Through heavy timber and dense undergrowth.

Ascend over rolling ground, bears NE. & SW.

17.00 Summit of ridge, bears E. & W., 150 ft. above cor.

18.00 Begin descent, bears E. & W.

27.00 Begin descent, brs. NW. & SE., 100 ft. below top of ridge.

32.94 Old $\frac{1}{4}$ sec. cor., bears E. 13.51 chs. dist.
I destroy cor. and marks on bearing trees.

34.00 Enter old burn, brs. NW. and SE.

40.00 Set a cedar post, 3 ft. long, 5 ins. sq. 24 ins. in the ground, for $\frac{1}{4}$ sec. cor. marked $\frac{1}{4}$ S. 11 on W. and 12 on E. faces, from which bears,

(5)

Section 12, Tp. 39 N., R. 6 E., W. M.

A hemlock 12 ins. dia. S. 81° E. 32 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.

A hemlock 24 ins. dia. N. 53° W. 52 lks. dist.

mkd. $\frac{1}{4}$ S. 11 B. T.

44.60 Stream 2 lks. wide, course NE.

65.45 Stream 15 lks. wide, course E. and foot of descent 950 ft. below top.

65.70 Begin ascent, bears E. & W.

67.50 Summit of ascent, bears E. & W., 70 ft. above stream, and begin gradual descent, bears NW. & SE.

72.20 Old sec. cor., bears E. 13.95 chs. dist., I destroy cor. and marks on bearing trees.

73.19 A fir 36 ins. dia. on line. I mark with 2 notches on N. & S. sides.

80.00 Set a cedar post, $3\frac{1}{2}$ ft. long, 5 ins. sq. 30 ins. in the ground, for cor. to secs. 1, 2, 11 and 12, marked,
T. 39 N. S. 1 on NE.
R. 6 E. S. 12 on SE.
S. 11 on SW. and
S. 2 on NW. faces, with 5 notches on S. and 1 on E. edges, from which bears,
A hemlock, 10 ins. dia. N. $80\frac{1}{2}^{\circ}$ E. 41 lks. dist.

mkd. T. 39 N. R. 6 E. S. 1 B. T.
A cedar 18 ins. dia. S. $91\frac{1}{2}^{\circ}$ E. 44 lks. dist.
mkd. T. 39 N. R. 6 E. S. 12 B. T.
A hemlock 14 ins. dia. S. 32° W. 20 lks. dist.

mkd. T. 39 N. R. 6 E. S. 11 B. T.
A hemlock 16 ins. dia. N. 47° W. 34 lks. dist.

mkd. T. 39 N. R. 6 E. S. 2 B. T.
This cor. is 120 ft. below top of descent.
Land rolling. Soil, gravelly, loam, 2d and 3d rate.

Timber, hemlock, fir, cedar, larch, and fir balsam,

Undergrowth, the same with huckleberry, salmonberry, and devil club. Heavily timbered land and land covered with dense undergrowth, 80.00 chs. August 11, 1905.

Section 12, Tp. 39 N., R. 6 E., W. M.

(North line of section 12.)

N. $89^{\circ} 59'$ E. on a random line bet. secs. 1 and 12.

- 40.00 Set temp. $\frac{1}{4}$ sec. cor.
- 79.98 Intersect the east bdy. of Tp. 7 lks. S. of
the cor. of secs. 1, 6, 7 and 12.
Thence I run.
S. $89^{\circ} 56'$ W. on a true line bet. secs. 1
and 12.
Through heavy timber and dense under-
growth.
Over level ground.
- 8.00 Begin gradual ascent, over rolling ground,
bears N. 70° W. and S. 70° E. and enter
old burn, brs. N. & S.
- 24.80 Stream 8 lks. wide, course N. 20° E.
- 26.20 Old $\frac{1}{4}$ sec. cor., bears S. 8.15 chs. dist. I de-
stroy cor. and marks on bearing trees.
- 28.15 Stream 5 lks. wide, course N.
- 30.75 Old trail, bears N. 30° E. and S. 30° W.
- 39.99 Set a hemlock post, 3 ft. long, 3 ins. sq. 24
ins. in the ground, for $\frac{1}{4}$ sec. cor., marked
 $\frac{1}{4}$ S. 1 on N. and 12 on S. face, from
which brs.
A fir 6 ins. dia. N. 3° W. 21 lks. dist.
mkd. $\frac{1}{4}$ S. 1 B. T.
A fir 7 ins. dia. S. $31\frac{1}{2}^{\circ}$ E. 12 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.
- 53.20 Stream 6 lks. wide, course N.
- 64.40 Trail, brs. N. & S.
- 70.50 Summit of ascent, bears NW. & SE., 650 ft.
above foot.
- 71.00 Begins steep descent over ledges of rock,
bears S. 70° W. and N. 70° E.

75.20 Stream 10 lks. wide, course N. 30° E. and foot of descent 150 ft. below top.

75.40 Begin steep ascent, bears N. & S.

79.98 The cor. of secs. 1, 2, 11 and 12. 200 ft. above stream.

Land rolling, Soil gravelly loam & rocky, 2d, 3d & 4th rate. Timber, hemlock, fir, cedar & alder. Undergrowth, the same with huckleberry, salmonberry, devil club, cherry & willow. Heavily timbered land and land covered with dense undergrowth, 79.98 chs. (August 12, 1905.)

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DEPARTMENT OF THE INTERIOR.

OFFICE OF U. S. SURVEYOR GENERAL.

State of Washington.

Olympia, April 1, 1922.

I, Clair Hunt, U. S. Surveyor General for Washington, do hereby certify that the annexed transcript of the field-notes of the survey of section 12, Tp. 39 N., R. 6 E., of the W. M., is a true and literal exemplification from the official field-notes of said survey now on file in this office.

[Seal]

CLAIR HUNT,

United States Surveyor General for Washington.

